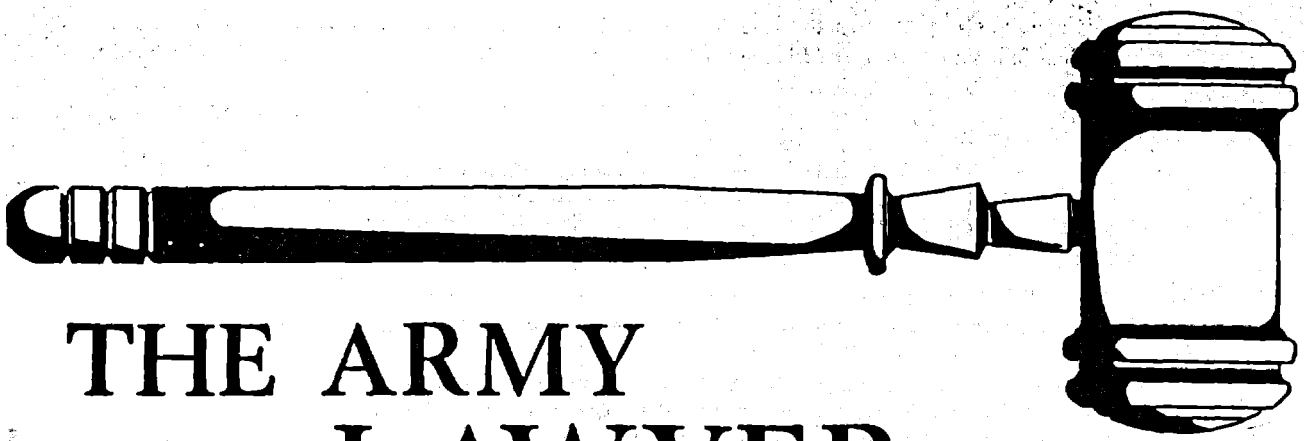

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Applicability of the Service Contract Act to Maintenance and Overhaul Contracts for Major Weapons Systems Components

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Introduction

One of the most important things that a contract attorney can do for the contracting officer whom he or she advises is to find and apply exceptions to the Service Contract Act's[1] (SCA) coverage of maintenance and overhaul (M&O) contracts for major weapons systems components.[2] While the Department of Defense (DOD) limits their number and scope, these M&O contracts are often high-cost and high-visibility procurements. This is especially true in Army Materiel Command (AMC) activities such as the Army Aviation Systems Command (AVSCOM)[3] and other similar DOD buying commands.

The issue of the SCA's application to maintenance and overhaul contracts for major weapons systems components in this specialized area often can lead to disagreements between legal offices and the procurement offices they service. It also can lead to inconsistent legal opinions from attorneys within the same legal office. This article will provide some insight into an area of weapons systems contracting to which legal commentators have given very little attention. It also may serve as a general analytical guide for procurement attorneys who must resolve the issue of SCA applicability as part of a contract review.

History and Purpose of the SCA

The SCA is the third in a series of three federal statutes that serve to protect workers, improve working conditions, and raise wages of government contractor employees.[4] The SCA covers employees working under federal service contracts. The Davis-Bacon Act covers employees working under federal construction contracts.[5] The Walsh-Healey Act covers employees working under federal supply contracts.[6]

All three statutes have the same basic purpose—that is, they protect the wage rates of certain employees of government contractors and subcontractors from the effect of the federal procurement process.[7] The statutes accomplish their purpose through regulatory procedures that force government contractors to pay a minimum wage rate. Generally stated, the Walsh-Healey Act uses the Fair Labor Standards Act minimum wage rate. The Davis-Bacon Act minimum wage rate is the prevailing wage rate in the locality where the contractor is to perform the construction work. The SCA minimum wage rate is the higher of either the prevailing wage rate in the geographic area of performance for similar type employees, or the wage rate established under a prior collective bargaining agreement.

Although the purpose of each statute is the same, each statute has its own peculiar set of implementing regulations. The two major reasons for this are: 1) the diverse nature of the three industries the statutes cover; and 2) the differing impact of government contracts upon those industries. Regulations that are appropriate for the construction industry are not necessarily appropriate for the supply or service industry.[8]

The Problems

Either the Service Contract Act or the Walsh-Healey Act may apply to an M&O contract, whereas the Davis-Bacon Act, which covers construction contracts, obviously does not. The SCA and the Walsh-Healey Act, however, have peculiar implementing regulations, each of which has a different effect on the procurement process. These differing effects cause contracting officers to "favor" one of the applicable statutes whenever possible in the M&O area.

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[1] 41 U.S.C. §§ 351-58 (1982).

[2] The Department of Labor (DOL) has implemented the SCA at 29 C.F.R. § 4 (1989). Further implementing regulations for the SCA appear in Defense Acquisition Reg. 12-1000 (1 Jul. 1976) [hereinafter DAR]. When the Federal Acquisition Reg. (1 Apr. 1984) [hereinafter FAR] came into effect, no SCA coverage existed because the DOL was in the process of writing new regulations. The DAR, therefore, continued to provide the acquisition coverage until the FAR was amended, effective 7 June 1989, to add SCA coverage. That new coverage now appears at FAR 22.10. The new FAR coverage, however, contains no substantive changes from the previous DAR coverage that would affect the analysis in this article.

[3] The author recently completed a tour as the AMC Contract Law Intern at AVSCOM. Legal review of these multi-million dollar M&O contracts for helicopter parts, such as rotor blades, engines, transmissions, and rotor hub assemblies, was a major part of the legal office workload.

[4] Brooks, *Service Contract Act Amendments of 1972*, 66 Mil. L. Rev. 67 (1974).

[5] 40 U.S.C. § 276a (1982).

[6] 41 U.S.C.A. § 35 (West Supp. 1990).

[7] Brooks, *supra* note 4, at 68. The Federal Government requires agencies to award contracts to the lowest bidder. Because labor costs are usually the predominant cost factor in service contracts, the probability of winning a contract generally favors the bidder who pays the lowest wages to its workers. Accordingly, contractors wishing to pay above-average wages often "price themselves out" of government contracts. When the government awards a contract to a contractor with a low wage scale, the government effectively subsidizes subminimum wages. Congress passed the SCA, the Walsh-Healey Act, and the Davis-Bacon Act in an attempt to counteract this particular impact of government contracting policies. *See id.*

[8] *Id.* at 69.

The SCA regulations require contracting agencies to file a notice of intention to make a service contract with the Department of Labor (DOL).[9] Filing of the notice must occur at least sixty days (or thirty days for unplanned procurements) before issuing any invitation for bids or request for proposals. The DOL then conducts a wage survey to find the prevailing wage rate for the place where the performance will occur. In competitive M&O contracts, this may require multiple wage determinations for several places around the country. The contracting officer normally must wait for the DOL to provide the wage determination because it becomes part of the solicitation, negotiations, and subsequent contract. Only in exceptional cases will a contract award occur without a wage determination. Even then, the contracting officer eventually must incorporate the wage determination in a contract modification and must adjust the contract price equitably after award.

This procedure's effect on the contracting process at an AMC command such as AVSCOM is considerable. Buying commands thrive on assembly-line contracting. A massive volume of contracting actions and money flows through buying commands such as AVSCOM each year. These commands seek to obligate the most money in the least amount of time. Contracting officers do not want another requirement that adds paperwork. Accordingly, they would rather not have to satisfy another regulatory requirement that will protract procurement lead time. Absent an urgent need, the Federal Acquisition Regulation (FAR) already requires a minimum period of forty-five days from the notice of a new procurement to contract award.[10] The SCA procedures described above, however, add a minimum of fifteen to forty-five days of time.[11] Accordingly, instead of a forty-five day minimum procurement lead-time period, the period becomes sixty to ninety days.

In actual practice, the DOL rarely even meets the sixty-day period for issuing a wage determination. For the most simple case, the DOL will issue a wage determination in sixty to seventy days. If several possible places of performance exist, such as in competitive procurements, multiple wage determinations are necessary. In these cases, the DOL will take closer to 120 days or longer to issue wage determinations. In addition, DOD agencies often exacerbate the delay by failing to submit timely notice of their intention to make a service contract.[12] Consequently, complying with the SCA has extended the lead time of DOD procurements substantially and has put the DOD's procurement schedule at the mercy of another federal agency. Most unfortunate, the DOL's priorities in arriving at wage determinations, which seek to satisfy the administration's labor policies, often may differ from the DOD's priorities in processing procurements, which seek to satisfy national security interests.

In addition, the SCA issue potentially can cause other problems.[13] Lengthening procurement lead time, however, is the most serious SCA-created obstacle to contracting officers at DOD buying commands. To pro-

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[9] 29 C.F.R. § 4.4(a)(1) (1989).

[10] FAR 5.203. Publication in the Commerce Business Daily, giving notice of a contract, must occur at least 15 days before issuance of a solicitation. The agency must then give at least 30 days' response time from the date of issuance of a solicitation until the required date for receipt of bids or proposals.

[11] Assuming a contracting officer is efficient enough to hit all required dates exactly on time, the combination of SCA requirements and FAR notice requirements will result in a minimum period of 60 days' lead time before award for an unplanned procurement, and 90 days' lead time before award for a planned procurement. (Unplanned procurement: 30 days' notice of intention to the DOL before issuance of solicitation, plus 30 days' response time for receipt of bids or proposals. Planned procurement: 60 days' notice of intention to DOL before issuance of solicitation, plus 30 days' response time for receipt of bids or proposals.).

[12] Telephone interview with LTC Terry E. Thomason, Labor Advisor, Office of the Judge Advocate General (Feb. 28, 1990) (providing information on the actual practice of the DOL). Additional information on the DOL's practices comes from the author's personal experience and observation. *See supra* note 3.

[13] Lengthening procurement lead time causes another potential problem in addition to interfering with the timeliness and promptness of contracting for the delivery of expensive and important components. M&O contracts are funded with Operations and Maintenance (O&M) funds, which expire annually. M&O requirements that arise in the last half of the fiscal year run the danger of losing their funding as the fiscal year nears its end. In funding M&O contracts, unfortunately, officials simply cannot "slide over" into the new fiscal year and award the contract with new year O&M money. Reprogramming occurs as new procurement priorities emerge and as the total amount of available O&M money changes from year to year. Occasionally, a contracting officer with many months of procurement work invested in a solicitation will near award only to have his work put on hold when the new fiscal year arrives. If the delay becomes substantial, the contracting officer literally may have to restart the entire procurement from scratch.

Another consideration is that characterization of M&O contracts for SCA purposes also potentially affects contract type and funding issues because of the rules on crossing fiscal years and bona fide needs. The contract type naturally will depend upon whether the characterization of an M&O contract indicates that it is for "service" or "supply." For example, an indefinite quantity minimum/maximum contract with a multiple-year ordering period might be appropriate for a supply contract but would not be appropriate for a services contract, which must be for a maximum of one year. The government normally buys services using a one-year contract with multiple option years. M&O contracts characterized as "service" probably would have to switch fiscal year funding during performance because these services would generally be severable. On the other hand, M&O contracts characterized as "supply" would not necessarily have to use different fiscal year O&M funds.

A full explanation of these contract type and funding issues is beyond the scope of this article and would require extensive explanation of fiscal law rules because they differ between services and supplies. The point here is that these issues also are heavily involved in the SCA applicability issue and influence contracting officers in their analysis of the issue.

curing officials in buying commands, these periods of fifteen to forty-five or more days are *not* insignificant.

The effects of the SCA on the procurement schedule demonstrate how regulatory requirements that superficially appear relatively harmless can have a significant impact on the acquisition process. When contracting officers seek to avoid applying the SCA to M&O procurements, the motivation is not a substantive preference of one labor statute over another. Instead, the motivation is something much more simple—that is, following the SCA implementing regulations is a substantial burden that disrupts an already bumpy contracting process and that is more onerous than complying with the other statutes. For example, compliance with the Walsh-Healey Act requires no pre-award action other than including certain clauses in the solicitation and award. In addition, post-award action under the Walsh-Healey Act consists only of monitoring compliance. Finally, under some types of federal procurement contracts, no additional requirements exist because none of the three labor statutes apply. The SCA, however, requires the agency to comply with substantial pre-award filing procedures, creates significant procurement delays, and often compels contracting officers to take action on contracts after award.

Major Weapons Systems Components M&O Contracts

Before addressing the issue of SCA applicability to M&O contracts, an example of what an M&O contract does and how it works would be helpful. A brief description of the processes involved in overhauling the transmission of a highly complex BLACKHAWK helicopter would be illustrative.

At a preset point in the useful lifetime of a BLACKHAWK helicopter, the prime manufacturer's specifications will call for the removal and overhaul of its transmission. The M&O contract will provide for all of the work required to perform this maintenance. A Depot Maintenance Work Requirements (DMWR) document, which actually is a thick service manual, sets out the requirements for the overhaul. The DMWR will detail with precision everything the contractor must do to the helicopter transmission during the overhaul. Some typical requirements include teardown, inspection, analysis, optional or mandatory parts replacement, repair, and reassembly. Inspection and analysis could consist of anything from a simple visual inspection for wear to sonograms and x-rays of the parts. Parts replacement could be anything from optional replacement, if a part shows a certain amount of wear, to 100% mandatory parts replacement regardless of any signs of wear. A 100% parts replacement might entail tearing down the transmission to a bare metal shell and replacing every removable part. Overhauls normally result in a "like-new" part that has the same life expectancy as a part straight off the original assembly line.

In addition to providing for the work necessary to refurbish the transmission, the M&O contract might include a requirement to modify the part. DOD constantly improves and upgrades major weapons systems. For instance, an improvement in the BLACKHAWK's systems may require a modification or retrofit to its transmission to accommodate the upgrade. For convenience and cost saving, DOD may incorporate the modification or retrofit into the normally scheduled overhaul of the transmission. Depending upon the complexity of the DMWR and any modification or upgrade of the part, the skills of personnel who actually perform the work may vary significantly. Accordingly, the workers involved in overhauling the BLACKHAWK transmission could range from high school graduates to aerospace engineers with doctoral degrees. This diversity in skills can occur even in a normal overhaul, when modification of the system is not part of the M&O contract.

Among other miscellaneous contract line items in M&O contracts, two major items comprise the majority of the cost of the contract: labor and parts. The M&O contract normally breaks down labor into several separate line items. For example, the labor required to tear down, inspect, and analyze a BLACKHAWK transmission might appear under one line item; the labor involved in overhauling, repairing, and replacing parts may appear as a second line item; and the labor costs required to make a modification could appear as a third line item. The second major item—the cost of the parts—includes all of the expenses incurred by the contractor in replacing or adding parts according to the DMWR and any modification instructions. In M&O contracts, the cost of the parts line item can be many times the total cost of the labor line items, depending upon the extent of parts replacement and the cost of the particular parts.

Of course, every overhaul is different because every part is different. The extent of disassembly, analysis, repair or replacement of parts, and modification varies greatly from system to system. For instance, even overhauls for the same type of BLACKHAWK transmission may vary substantially because of differences in each helicopter's flight hours or unusual wear on an individual part. These variances, and the other aspects of overhaul described above, allow for some discretion in applying the SCA to a specific M&O contract.

SCA Applicability

Service Contracts Generally

The SCA applies to every contract entered into by the United States or the District of Columbia costing more than $2,500, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States using service employees.[14] The definition of services is very broad and neither the SCA nor the imple-

[14] 41 U.S.C. § 351 (1982); 29 C.F.R. § 4.110 (1989); FAR 22.1003-1.

menting regulations try to define or limit the types of services that fall under the SCA.[15] Instead, various sections of the regulations provide examples of the types of services the SCA covers.[16]

M&O Contracts for Major Weapons Systems Components

A fair reading of the current SCA regulations requires the general assumption that the SCA does apply to these M&O contracts. The regulations specifically include the example of "maintenance and repair of all types of equipment, e.g., aircraft, engines, electrical motors, vehicles."[17]

Because of the specific reference to aircraft, the Air Force has fought the issue of SCA applicability before the Comptroller General and in court for several years. The Air Force's concern has been over M&O contracts for jet engines and entire aircraft. Its primary argument has been that the significant amount of rebuilding or replacement of parts done under these contracts results in the Air Force's receiving a virtually new end item from the M&O contractor. In their view, this makes the contracts subject to the Walsh-Healey Act instead of the SCA. The cases show that, at one time, the DOL agreed with the Air Force's proposition. The DOL position, however, gradually changed over the years to the point that it viewed almost all of these M&O contracts as falling under the SCA.[18]

The Air Force continued to resist the DOL's view. Accordingly, the DOL amended its regulations concerning SCA applicability to M&O contracts in 1983. The DOL's new guidelines detail at what point the work on equipment is so extensive that it constitutes remanufacturing subject to the Walsh-Healey Act instead of servicing subject to the SCA. The current position of the DOL is that the SCA applies to all M&O contracts unless a particular contract meets the 1983 guidelines.[19]

Significant SCA Exceptions

The SCA applies to every contract entered into by the United States or the District of Columbia over $2,500, whether negotiated or advertised, *the principal purpose of which is to furnish services* in the United States *using service employees.*[20] The emphasized portions of this restatement of the basic statute are the two areas that are ripe for the application of contracting officer discretion in determining SCA application.

"The Principal Purpose of Which is to Furnish Services"

The first major SCA coverage exception is the "principal purpose" exception. If the principal purpose of the contract is to provide something other than services, the SCA does not apply. Accordingly, if the contractor is to provide services that are only incidental to the performance of a contract for another purpose, the SCA will not apply. No certain definition of the term "principal purpose" exists. Neither the contract form nor the title used by the procuring agency is conclusively determinative of the issue. Instead, one must evaluate all of the facts in each particular case in deciding whether a contract's "principal purpose" is to provide a service. Even when tangible items of high value are important elements of the contract, the requirements specified in the contract may show that the tangible items actually are of secondary importance to the furnishing of services.[21]

The key "principal purpose" issue in the M&O area is whether the contract is a service contract or a supply contract. Work subject to the Walsh-Healey Act is exempt from SCA coverage.[22] The Walsh-Healey Act applies instead of the SCA when the M&O contract is principally for remanufacturing a system extensively enough to be equivalent to supplying a virtually new piece of equipment.[23] The regulations in this area are fairly specific as a result of the historical disagreement between the Air

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[15] 29 C.F.R. § 4.111(b) (1989).

[16] *Id.* §§ 4.111(b), 4.130; FAR 22.1003-5(k).

[17] 29 C.F.R. § 4.130(a)(33) (1989); FAR 22.1003-5(k).

[18] *See* Curtis-Wright Corp. v. McLucas, 381 F. Supp. 657 (D.N.J. 1974); B. B. Saxon Co., Comp. Gen. Dec. B-190505 (1 June 1978), 78-1 CPD ¶ 410; Lockheed Aircraft Service Co., Comp. Gen. Dec. B-178773 (6 Dec. 1973), 53 Comp. Gen. 412.

[19] *See* American Fed'n of Labor v. Donovan, 757 F.2d 330 (D.C. Cir. 1985).

[20] 41 U.S.C. § 351 (1982); 29 C.F.R. § 4.110 (1989); FAR 22.1003-1.

[21] 29 C.F.R. § 4.111(a) (1989).

[22] 41 U.S.C. § 356 (1982); 29 C.F.R. § 4.117(a) (1989); FAR 22.1003-3(b).

[23] 29 C.F.R. § 4.117(b) (1989); FAR 22.1003-6(a).

Force and the DOL. The contracting officer, however, still has room to analyze the application of the SCA to a contract and to exercise some discretion. A contracting officer might try to apply two SCA exceptions to M&O contracts covering major weapons systems components: 1) the "major overhaul" exception; and 2) the "major modification" exception.

The first exception—major overhaul—arises when an item, piece of equipment, or materiel is degraded or inoperable, and when all of the following conditions exist:

1) The contractor substantially or completely must tear down the item or equipment into individual component parts;

2) The contractor substantially reworks, rehabilitates, alters, or replaces all of the parts;

3) The contractor reassembles the parts so as to furnish a totally rebuilt item or piece of equipment;

4) The M&O contractor uses manufacturing processes similar to the processes that the prime contractor used in the original manufacture of the item or piece of equipment;

5) The contractor commingles the disassembled components, if usable, with existing inventory and, because of this commingling, the components lose their identification with respect to a particular piece of equipment;[24]

6) The contractor restores the overhauled items or equipment to a point at which they have recovered nearly all of their original life expectancy; and

7) The contractor performs the work in a facility owned or operated by the contractor.[25]

Finding M&O contracts for complex weapons systems components that would meet all the rules above actually would be common. Applying these rules to the discussion about M&O contracts for parts such as a BLACKHAWK transmission, one can make several observations. First, virtually all overhauls would satisfy the basic condition that the contract must cover work on a degraded or inoperable part. Conditions 6 and 7 also will exist in almost every overhaul. This means that the SCA applicability issue under the major overhaul exception usually will arise under conditions 1 through 5. All five remaining conditions, however, usually will occur whenever the DMWR requires substantial mandatory parts replacement. Contracting officers or their attorneys, however, should be able to make that determination with relative ease by: 1) reviewing the DMWR themselves; 2) consulting with an engineer from the office responsible for the DMWR; or 3) consulting with the potential overhaulers.

The second exception to SCA coverage involves "major modification." As pointed out earlier, modification is not uncommon when dealing with the parts of major weapons system components. The major modification exception applies when an item, piece of equipment, or materiel is wholly or partially obsolete and all the following conditions exist:

1) The contractor completely or substantially must tear down the item or equipment;

2) The contractor replaces outmoded parts;

3) The contractor rebuilds or reassembles the item or equipment;

4) The contract work results in furnishing a substantially modified item in a usable and serviceable condition; and

5) The contractor performs the work in a facility owned or operated by the contractor.[26]

Because modifications and upgrades are a regular part of so many M&O contracts for major weapons systems components, this exception can be very useful. In most contracts involving modification as part of the effort, the acquisition will meet every condition for the application of this SCA exception, except perhaps condition number 4. The issue the contracting officer then must address is whether or not the modification is substantial. Unfortunately, no determinative definition of "*substantial* modification" exists. The contracting officer, however, should look at whether some important characteristic of the part will be different after the contractor has modified it in accordance with the M&O contract requirements. Characteristics to look at for "substantial modifications" would include power, life span, weight, dimensions, number of subassemblies, material composition of the part, and capacity. Because of the high degree of technology and the complexity of most of the parts in question, almost any change probably would fall into the category of substantive change.

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[24]This condition will not apply when the number of items or pieces of equipment involved are too few to make commingling practicable.

[25]29 C.F.R. § 4.117(b)(1) (1989); FAR 22.1003-6(a)(1).

[26]29 C.F.R. § 4.117(b)(2) (1989); FAR 22.1003-6(a)(2).

Contracting officers and their attorneys should remember that *either* "major overhaul" *or* "major modification" serve to remove the M&O contract from SCA coverage. Generally, in applying these two exceptions, contracting officers or their attorneys should be looking for M&O situations in which the contractor's work on the item will be so extensive—so "major"—that the return of the "serviced" item actually is tantamount to "supplying" a new part.

A final factor in the analysis of the primary purpose issue is the relative cost of various line items in the contract. In the past, the DOL would apply the SCA to individual service line items, and the Walsh-Healey Act to individual supply line items, in the same contract. Because of the confusion and difficulty this created, the DOL clearly has ruled out dual application of the SCA and the Walsh-Healey Act to the same contract.[27] The DOL has adopted the view that the issue is one of deciding the "principal purpose" of the entire contract based upon all the circumstances. Consequently, the principal purpose of the contract will control the treatment of the entire contract.

The DOL interpretation, however, indicates that the most expensive line item in a contract may help to determine its principal purpose.[28] If the contract involves only overhaul, and if the parts line item is significantly larger than the labor line items, this arguably may indicate that the primary purpose is major overhaul.[29] Similarly, if an M&O contract involves modification, and if that line-item cost is a significant percentage of the labor line item or the parts line-item costs, that arguably may indicate that the primary purpose of the contract is major modification.

"Through the Use of Service Employees"

The other possible exception to SCA coverage that can arise in M&O contracts covering major weapons system components is the use of professional employees. To fall under SCA coverage, the principal purpose of the contract must be to furnish services using "service" employees. If professional employees perform essentially all the services under the contract, and if the use of service employees is only a minor factor, the SCA will not apply. Instead, the contract would be one whose principal purpose is to supply professional services, and by its express terms the SCA is not applicable to professional service contracts.[30]

Historically, the distinguishing criterion between a professional employee and a service employee related to the position the employee would hold if that employee were working for the federal government—that is, a worker is a professional employee if he or she would be a general schedule federal employee, and a service employee if he or she would be a wage grade federal employee.[31] Congress, however, amended the SCA in 1976 to make clear that this was not the proper distinction to use. The SCA clearly applies to both blue and white collar workers.[32]

The term "professional" is subject to a very detailed set of five requirements. The gist of these requirements is that the employee must perform work of an intellectual nature. The work must require the use of discretion based upon that intellect as opposed to routine mental, manual, mechanical, or physical work. Moreover, the intellect involved must be the result of specialized higher learning as opposed to general education or apprenticeship. The employee may spend up to twenty percent of his workweek on nonprofessional work and his salary must exceed $170 per week.[33]

Initially, these seemingly strict definitions of professional workers apparently would not include most workers on M&O contracts covering major weapons system components. The regulatory interpretations of these five requirements, however, specifically include engineering. In addition, the regulatory interpretations significantly expand the meanings of the requirements.[34] For example, one of the requirements is that the individual performing the work must possess some sort of advanced knowledge to perform the work successfully.[35] The interpretations section of the regulations, however, later defines this as knowledge beyond the high school level—arguably not a very high standard.[36]

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[27] *American Fed'n of Labor*, 757 F.2d at 345.

[28] *See* Tenavision, Inc., Comp. Gen. Dec. B-231453 (4 Aug. 1988), 88-2 CPD 114; 29 C.F.R. § 4.131(a) (1989).

[29] The line-item cost is normally an estimated dollar amount based upon the DMWR and past overhaul experience.

[30] *See* 41 U.S.C. § 357 (1982); 29 C.F.R. § 4.113(a)(3) (1989).

[31] *See* Federal Elec. Corp. v. Dunlop, 419 F. Supp. 221 (M.D. Fla. 1976); Descomp, Inc. v. Sampson, 377 F. Supp. 254 (D. Del. 1974); Secretary of Labor, 53 Comp. Gen. 370 (1973).

[32] *See* Arthur Young & Co., Comp. Gen. Dec. B-216643 (24 May 1985), 85-1 CPD ¶ 598; 29 C.F.R. § 105(c) (1989).

[33] 29 C.F.R. § 541.3 (1989).

[34] *Id.* §§ 541.301-.315.

[35] *Id.* § 541.3(a)(1).

[36] *Id.* § 541.302(b).

In the area of M&O contracts for major weapons system components, many contracts would involve mostly workers who would fit the definition of "professional employee." This is particularly true in two cases. First, it would be likely when the DMWR requires extensive teardown and wear analysis of parts, instead of requiring mandatory parts replacement. Especially in cases requiring more than a simple visual inspection for wear, workers often are college graduate aerospace specialists applying a high degree of discretionary judgment. Conversely, workers would exercise little discretion when parts replacement is mandatory and, therefore, would need less advanced or specialized education. Second, in contracts involving modification, a responsible and qualified worker performing the necessary changes to major weapons system components almost certainly would have to be some type of aerospace, electrical, or mechanical engineer.

In addition to the possibility of meeting the professional definition outright, a special provision exists for high-salaried professional employees. When an employee earns at least $250 per week, exclusive of board, lodging, or other facilities, no requirement arises to test the employee's qualifications in detail under the five-part test.[37] However, finding an employee working on an M&O contract for a major weapons system component who is receiving pay at less than $250 per week would be unusual because the employee's annual salary would amount to only $12,000—a manifestly low income for an individual working on such a sensitive item of equipment. Accordingly, this special $250-per-week threshold provision means that the five-part test standards clearly are less important to most situations involving employees working pursuant to M&O contracts for major weapons system components.

The area of professional services is one in which an aggressive contracting officer could find a previously unnoticed SCA exception. To do this, the contracting officer must make the effort to communicate with the contractors involved about their employees and their pay scales. Even a cursory review of the definitions reveals that the term "professional" for SCA purposes is far broader than it initially might appear.

Contracting Officer Good-Faith Determinations

An analysis of the SCA's applicability to M&O contracts for major weapons system components would not be complete without discussing the significance of the contracting officer's duty to make good-faith determinations on the SCA issues addressed in this article. The questions posed by the definitions of "major overhaul," "major modification," and "professional employee" are important because the contracting officer makes the initial—and often the only—determination about SCA coverage on any particular contract.

Ultimately, the DOL has the authority to decide whether or not the SCA applies to a particular procurement.[38] The DOL regulation and FAR provisions that implement the SCA, however, do not require the contracting officer to submit every procurement to the DOL for resolution. The initial decision of whether the SCA applies to a procurement rests with the contracting agency. A referral to the DOL must occur only when the contract *may* be subject to the SCA.[39] If the agency does not believe the SCA applies, then no duty arises either to notify the DOL or to include SCA provisions in the contract.[40]

The DOL regulations, however, require submission of "close" questions to the DOL for resolution.[41] Likewise, the FAR requires submission of any "unresolved" questions to DOL for resolution.[42] Comptroller General opinions and court cases that have dealt with the referral issue look at whether the contracting agency acted reasonably and in good faith in not referring the issue to the DOL.[43] These authorities examine whether the responsible officials made any deliberate or arbitrary attempt to circumvent any statutory or regulatory provision.[44] Consequently, contracting officers and their lawyers clearly are free to grapple with the SCA issues and make *good faith* determinations without referral to the DOL.

Conclusion

Maintenance and overhaul contracts for major weapons systems components represent a fairly small number of federal procurements. Because of their complexity, their high dollar value, and the importance of the

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[37] *Id.* § 541.315.

[38] *Id.* § 4.101(b).

[39] Brooks, *supra* note 4, at 99.

[40] Tenavision, Inc., Comp. Gen. Dec. B-231453 (4 Aug. 1988), 88-2 CPD ¶ 114.

[41] 29 C.F.R. § 4.113(a)(4) (1989).

[42] FAR 22.1003-7.

[43] *See* Curtis-Wright Corp. v. McLucas, 381 F. Supp. 657, 666 (D.N.J. 1974); Tenavision, Inc., Comp. Gen. Dec. B-231453 (4 Aug. 1988), 88-2 CPD ¶ 114.

[44] B. B. Saxon Co., Inc., Comp. Gen. Dec. B-190505 (1 June 1978), 78-1 CPD ¶ 410.

weapons systems involved, however, these contracts can be among the most highly visible procurements in the commands that support major weapons systems.

The applicability of the Service Contract Act to these acquisitions is an issue that arises regularly. When the SCA applies, contracting officers often see it as a disruption of the acquisition process. They therefore understandably prefer to avoid its application whenever possible.

In the initial analysis, the SCA clearly applies to these M&O acquisitions. However, major overhaul, major modification, and the use of professional employees are three significant exceptions that may remove a specific procurement from SCA coverage. Prudent contracting officers and their attorneys should not be content to simply assume that the SCA applies. Likewise, they should not automatically refer the issue outside of their agency to the DOL for resolution. On the other hand, they cannot simply make a cursory review and decide that the SCA does not apply. Rather, procurement officials must look at the SCA exceptions and then actively seek the information that will support their determination. They actually must open and read DMWRs; they must talk to government engineers; they must talk to contractors; and then they must make specific findings about the elements of the exceptions.

Making the effort to review SCA applicability will not guarantee that contracting officers or their attorneys will find an exception in every case. They will, however, find many cases to which the exceptions do apply, and they will be able to support the reasonableness of their determinations if DOL questions them. They also will be better able to explain why the SCA does apply when a superior wants to know the reason for a delay in the procurement process because of the requirement to comply with the SCA. In either case, an understanding of the SCA's applicability to M&O contracts for major weapons system components, as well as a particular awareness of the SCA's exceptions, will assist contracting officers and their attorneys in effectively managing an extremely costly and highly visible area of procurement.

Drug Detection by Hair Analysis

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In the February 1990 issue of *The Army Lawyer*, Major Karl Warner wrote a thought-provoking criminal law note on the possibilities of hair analysis as a means of drug detection.[1] This article addresses the subject in more detail by reviewing the development of hair analysis as a means of drug detection, by examining its relative advantages and shortcomings in relation to urinalysis, and by exploring its potential usefulness for the military trial attorney.

Dr. Werner A. Baumgartner[2] pioneered hair analysis as a means of drug detection.[3] Dr. Baumgartner first reported his experiments in the field in 1978,[4] and his continued work recently received a National Institute of Justice grant.[5] Others have conducted similar studies in the United States,[6] Europe,[7] and Japan.[8] In addition, late in 1989, the Army's Criminal Investigation Command (CID) Laboratory at Fort Gillem, Georgia, initiated a study into the feasibility of hair analysis for drug detection; CID, however, currently has placed the project on hold.[9]

The scientific principle underlying hair analysis is simple. As blood circulates through the body, it nourishes the hair follicle. If drug metabolites are present in the blood, trace amounts of the drug become entrapped in the core

[1] Note, *Hair Analysis—Overcoming Urinalysis Shortcomings*, The Army Lawyer, Feb. 1990, at 69-70.

[2] The sole focus of this article is the detection of drug metabolites in hair by chemical analysis. Other forms of hair analysis, such as deoxyribonucleic acid (DNA) testing or nutritional trace metal analysis, are beyond the scope of this article.

[3] Dr. Baumgartner is currently chairman and scientific director of Psychemedics Corporation (Psychemedics), a chemical laboratory specializing in hair analysis. Psychemedics' address is: 1807 Wilshire Blvd., Suite B-2, Santa Monica, CA 90403. Telephone: (800) 522-7424.

[4] Baumgartner, Jones, Baumgartner, & Black, *Radioimmunoassay of Hair for Determining Opiate-Abuse Histories*, 20 J. Nuclear Med. 749 (1979).

[5] Summary Report, *Hair Analysis for the Detection of Drug Use in Pretrial/Probation/Parole Populations*, NIJ Grant #86-IJ-CX-0029, Jan. 1990 (available from Psychemedics Corporation, *supra* note 3).

[6] *See* Martz, *Identification of Cocaine in Hair by GC/MS and MS/MS*, Crime Laboratory Dig., Jul. 88, at 67; Smith & Pomposini, *Detection of Phenobarbital in Bloodstains, Semen, Seminal Stains, Saliva, Saliva Stains, Perspiration Stains, and Hair*, 26 J. Forensic Sci. 582 (1981).

[7] *See* Viala, Deturmeny, Aubert, Estadieu, Durand, Cano, & Delmont, *Determination of Chloroquine and Monodesethylchloroquine in Hair*, 28 J. Forensic Sci. 922 (1983).

[8] *See* Ishiyama, Nagai, & Toshida, *Detection of Basic Drugs (Methamphetamine, Antidepressants, and Nicotine) from Human Hair*, 28 J. Forensic Sci. 380 (1983); Suzuki, Hattori, & Asano, *Detection of Methamphetamine and Amphetamine in a Single Human Hair by Gas Chromatography/Chemical Ionization Mass Spectrometry*, 29 J. Forensic Sci. 611 (1984).

[9] Telephone interview with Bruce Siggins, forensic chemist, United States Army Criminal Investigation Command Laboratory, Ft. Gillem, GA (Mar. 12, 1990). The laboratory's experiments with hair analysis by gas chromatography/mass spectrometry are currently at a standstill due to the unavailability of known positive standards for comparison.

of the hair[10] in amounts roughly proportional to those ingested.[11] Those traces remain in the hair as it grows out of the head at a rate of approximately one-half inch per month.[12] Because the hair itself contains the drug metabolites, the ingester cannot wash them away.[13] The drug metabolites do not diminish with time and will exist until the actual hair is destroyed.[14]

Hair analysis begins with the collection of a sample. In addition to hairs obtained by the standard collection methods of pulling or combing,[15] investigators may use cut hairs as well.[16] While analysts have derived positive test results from the analysis of a single strand of hair,[17] a larger sample of forty to fifty hairs is preferable.[18] A large sample from different areas of the scalp ensures that a sufficient number of hairs in the active growth stage will be present in the sample to support the test's reliability.[19] Analysts normally use head hair for testing, although facial, body, or pubic hair are acceptable substitutes.[20]

Once collected, the analyst washes the hair sample to remove possible external contaminants.[21] The analyst then chemically treats the cleaned hair samples to break down the hair structure and produce an extract.[22] Once treated, the hair extract undergoes an initial screening test by radioimmunoassay.[23] Analysts can confirm positive radioimmunoassay results by gas chromatography/mass spectrometry—the same confirmation test employed in urinalysis.[24] To date, controlled experiments using hair analysis techniques successfully have identified the presence of cocaine,[25] opiates,[26] barbiturates,[27] amphetamines and methamphetamines,[28] phencyclidine (PCP),[29] and marijuana.[30]

Hair analysis for the detection of drugs has a number of advantages over urinalysis. First, sample collection is

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[10] While hair probably absorbs drug metabolites by bonding with protein, *see* Midkiff, *Detecting Drugs in Hair: Targets and Techniques*, 13 Sci. Sleuthing Rev. 14 (Winter 1989), the scientific community still is not certain of the exact mechanism by which hair incorporates drug metabolites. *See* Smith & Liu, *Detection of Cocaine Metabolite in Perspiration Stain, Menstrual Bloodstain, and Hair*, 31 J. Forensic Sci. 1269, 1272 (1986).

[11] *See* Baumgartner, Jones & Black, *Detection of Phencyclidine in Hair*, 26 J. Forensic Sci. 576 (1981); Ishiyama, Nagai & Toshida, *supra* note 8, at 383.

[12] Telephone interview with Charles Midkiff, forensic chemist, National Laboratory Center, Bureau of Alcohol, Tobacco and Firearms (BATF) (Department of the Treasury) (Mar. 12, 1990). Body hair, such as facial and pubic hair, has a much slower growth rate than head hair. *See* Baumgartner, *Hair Analysis for Drugs of Abuse*, Employment Testing, Aug. 1, 1989, at 3.

[13] Baumgartner, Hill, & Blahd, *Hair Analysis for Drugs of Abuse*, 34 J. Forensic Sci. 1433 (1989). While repeated shampooing has no significant effect on the drug content of hair (actually, analysts routinely wash hair samples as part of the testing procedure to remove possible contaminants), the scientific community has not established the effects of cosmetic treatment of hair, such as perming or dyeing. Preliminary experiments with treated hair, however, indicate drug metabolites still will be detectable after these treatments. *Id.* at 1436.

[14] Baumgartner, Jones, & Black, *supra* note 11, at 577.

[15] *See* Committee on Forensic Hair Comparison, *FBI Hair Comparison Report*, Federal Bureau of Investigation Forensic Science Research and Training Center (1984). This report is a useful reference containing detailed guidance on the collection of hair exemplars.

[16] Unlike DNA testing, which generally requires the presence of the hair root for analysis, analysts can conduct hair analysis for drugs using only the hair shaft.

[17] *See* Smith & Pomposini, *supra* note 6, at 583. *See generally* Suzuki, Hattori, & Asano, *supra* note 8.

[18] Baumgartner, "Hair Analysis for Drugs of Abuse: Solving the Problems of Urinalysis," testimony before Subcomm. on Human Resources, House Comm. on Post Office and Civil Service, U.S. House of Representatives (May 20, 1987).

[19] Preliminary findings suggest a considerable difference in the concentration of drug metabolites in hair collected from different areas of the scalp. Baumgartner, Hill, & Blahd, *supra* note 13, at 1437. These variances are primarily attributable to the rate of hair growth. Hair does not grow at a constant rate, but has active and dormant growth periods that vary among individual hairs and among the different areas of the scalp. Only actively growing hairs absorb drug metabolites present in the bloodstream. *Id.* at 1435. A sufficiently large sample ensures that the analyst will collect some actively growing hair.

[20] Telephone interview with Roger Martz, forensic chemist, Chemistry-Toxicology Unit, Federal Bureau of Investigation Laboratory (Mar. 12, 1990); Baumgartner, *supra* note 12, at 4.

[21] Baumgartner, Hill, & Blahd, *supra* note 13, at 1435; *see also* Martz, *supra* note 6, at 67; Ishiyama, Nagai, & Toshida, *supra* note 8, at 381.

[22] Baumgartner, Hill & Blahd, *supra* note 13, at 1435.

[23] *Id.* at 1436-37; Baumgartner, Jones, Baumgartner, & Black, *supra* note 4; Smith & Liu, *supra* note 10, at 1270.

[24] Baumgartner, Hill, & Blahd, *supra* note 13, at 1437; Martz, *supra* note 6, at 67; Smith & Liu, *supra* note 10, at 1271; Midkiff, *supra* note 10, at 14; telephone interview with Roger Martz, *supra* note 20.

[25] Martz, *supra* note 6; Smith & Liu, *supra* note 10.

[26] Baumgartner, Jones, Baumgartner, & Black, *supra* note 4.

[27] Smith & Pomposini, *supra* note 6.

[28] Ishiyama, Nagai, & Toshida, *supra* note 8; Suzuki, Hattori, & Asano, *supra* note 8.

[29] Baumgartner, Jones, & Black, *supra* note 11.

[30] Baumgartner, Hill, & Blahd, *supra* note 13.

less intrusive[31] and more easily observed[32] than the collection of urine samples. In addition, hair samples are chemically and physically more stable than urine specimens.[33] Therefore, the collection, storage, and shipment processes are less complicated than those employed in urinalysis, and the dangers of contamination, leakage, or breakage, which often come with the processing of urine samples, are negligible.[34] Furthermore, while a urine sample collected at a later date obviously is not identical with an earlier specimen, investigators can obtain a second hair sample that, except for that portion representing intervening hair growth, is identical to an earlier sample.[35] Accordingly, hair analysis is less vulnerable to problems that arise when a person loses or destroys a sample, or when a chain of custody becomes subject to challenge. In addition, an analyst can establish the identity of a hair sample, if necessary, by deoxyribonucleic acid (DNA) testing or microscopic examination.[36]

Hair analysis also provides a wider "window of detection" than urinalysis. Most drug metabolites, with the exception of tetrahydrocannabinol (marijuana), rapidly excrete from the body.[37] Consequently, urinalysis ordinarily can detect only drug usage in the two-to-four-day time period preceding the collection of the urine specimen.[38] Because the hair shaft permanently entraps drug metabolites, however, hair analysis can detect drug use in the months—even years—preceding sample collection, depending on the length of the subject's hair.[39]

Significantly, subjects cannot easily evade the detection of drug use when investigators use hair analysis techniques. Temporary abstention for a period of several days ordinarily will result in a negative urinalysis (except in the case of marijuana usage).[40] Likewise, "flushing" the body by excessive fluid intake occasionally can defeat the efficacy of urinalysis.[41] Neither of these tactics, however, is effective against hair analysis.[42] The use of permanents or dyes on hair can, on the other hand, affect hair analysis results, but not sufficiently to avoid detection.[43] Even if a person shaves his or her head, he or she will not evade detection, because an investigator instead can take a sample of facial or body hair for analysis.[44]

Finally, unlike urinalysis, one attribute that is particular to hair analysis is its potential to quantify drug usage with reasonable accuracy.[45] By cutting the hair shaft into numerous segments and analyzing each segment, the forensic chemist can approximate the number of times that the subject has used drugs and the period of the subject's drug usage.[46] An analyst can determine these factors with relative precision by using hair growth approximations[47] as a basis for examining the hair sample as a "metabolic time line." Actually, the analyst could attain an even higher degree of precision if he or she makes the tests and calculations necessary to establish the true growth rate of the subject's hair;[48] however, the time and effort required to determine the actual

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[31] Midkiff, *supra* note 10, at 14; telephone interview with Bruce Siggins, *supra* note 9. Being less intrusive, investigators can obtain hair samples more easily and more quickly than by taking urine samples, which often pose problems of personal embarrassment or incontinence that may hinder a subject's ability to provide a specimen.

[32] A single individual can perform surveillance of hair collection from both male and female soldiers, thereby eliminating the necessity for the subject to handle, and possibly switch or adulterate, the sample. Moreover, the observation of hair collection would not be as degrading or humiliating (for either the subject or the observer) as with urine collection. *Cf.* Unger v. Ziemniak, 27 M.J. 349 (C.M.A. 1989) (observation by enlisted person of female officer providing urine specimen characterized as disagreeable, but justified).

[33] Baumgartner, Jones, & Black, *supra* note 11, at 580.

[34] *Cf.* Dept. of Army, Reg. No. 600-85, Personnel-General: Alcohol and Drug Abuse Prevention and Control Program, para. 10-5 (1 Oct. 88) (requiring use of bottles for the collection, storage, and shipment of specimens). Using the required bottles for hair analysis obviously would not be reasonably necessary. Rather, individuals who collect samples could use normal military police and CID procedures for handling evidence.

[35] Baumgartner, *supra* note 12, at 3.

[36] *Id.*

[37] Summary Report, *supra* note 5, at 5; Baumgartner, Hill & Blahd, *supra* note 13, at 1439, fig. 1.

[38] By way of example, cocaine is normally undetectable in urine 72 hours after the subject last used it. Isikoff, *Splitting Hairs to Find the Roots of Drug Use*, Washington Post, Mar. 14, 1990, at A15, col. 1. Analysts can detect marijuana use for up to three to four weeks prior to specimen collection. *Id.*

[39] Baumgartner, Hill & Blahd, *supra* note 13, at 1433; Summary Report, *supra* note 5, at 5; Ishiyama, Nagai, & Toshida, *supra* note 8, at 385.

[40] Isikoff, *supra* note 38. The exception is marijuana, whose metabolites can remain in the body for three to four weeks. *Id.*

[41] Summary Report, *supra* note 5, at 5.

[42] *Id.*; Midkiff, *supra* note 10, at 14.

[43] Baumgartner, Hill & Blahd, *supra* note 13, at 1436.

[44] Baumgartner, *supra* note 12, at 4; Baumgartner, Hill & Blahd, *supra* note 13, at 1443-44.

[45] Baumgartner, Hill & Blahd, *supra* note 13, at 1443-44; Isikoff, *supra* note 38.

[46] Baumgartner, *supra* note 12, at 4; Baumgartner, Hill, & Blahd, *supra* note 13, at 1443-44.

[47] Hair grows at an approximate rate of one-half inch per month. *See* Baumgartner, *supra* note 12 and accompanying text.

[48] Baumgartner, Hill & Blahd, *supra* note 13, at 1437.

growth rate of a person's hair militates against making these tests and calculations on a routine basis.[49]

Although hair analysis, as a means of drug detection, has many substantial benefits, it also has limitations. Of course, the major limitation for the Army lawyer is that the Army does not perform forensic hair analysis to test for drug use.[50] As previously noted, the Fort Gillem CID laboratory's feasibility study on hair analysis as a drug detection technique currently is on hold;[51] and when, if ever, the Army will implement a hair testing program is difficult to predict. Testing by private laboratories[52] is an option but the expense[53] and administrative paperwork associated with the Army's approving of, and acquiring the funding necessary for, these tests would preclude their routine use. While Dr. Baumgartner has developed an inexpensive screening test based on radioimmunoassay techniques,[54] for certain reasons, which this article will address later in more detail, the admissibility of these test results at courts-martial, absent additional confirmatory tests, is highly doubtful.

In addition to the practical problems faced by Army practitioners in the area of drug detection through hair analysis, a second major limitation of this technique is its inability to detect recent drug use. Drug metabolites present in the bloodstream must permeate the hair root before they become detectable.[55] Unless the analyst pulls the hair from the subject, or otherwise forcibly removes it, drug traces in the hair shaft would not appear outside the scalp until after several days of growth.[56] Cut hairs collected within three to four days of drug use, therefore, would not likely reveal the presence of drugs.[57]

Finally, in addition to the inherent disadvantages of current hair analysis techniques, a number of forensic chemists have criticized or questioned the purported ability of hair analysis to quantify drug use.[58] While scientists acknowledge the ability of hair analysis to detect long term drug use, the accuracy of estimations concerning the exact time and frequency of use depends substantially on the rate of hair growth, the type of hair, and other factors.[59] Without expensive and time-consuming testing to establish a known growth rate,[60] use of hair analysis to predict the time that a subject ingested a drug and the subject's frequency of use will yield no more than rough approximations that may not always be useful to the trial practitioner. More important, the ability to detect long term drug use requires hair of sufficient length.[61] Because shorter hair is the norm in the military, the use of a single hair analysis to detect a history of drug use in a subject likely will have little utility for the military attorney. While an analyst could use slower growing and normally uncut body hair as a substitute for head hair, the relative intrusiveness of collecting body hair probably would warrant the use of body hair analysis only as a last resort.

Considering its advantages and limitations, hair analysis, when compared to urinalysis, is a highly effective

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[49] *Id.* One simple but time-consuming method to determine the exact rate of hair growth is to bleach or dye the subject's hair and then measure hair growth after a suitable period of time—for example, one month. A quicker but more complicated method would involve fitting a glass capillary tube around a growing hair and taking measurements with a Dermascope.

[50] Telephone interview with Bruce Siggins, *supra* note 9. Mr. Siggins was unaware of any studies or testing being conducted by the other branches of service in this area. Dr. Baumgartner, in one of his articles, referred to a study he conducted at the Navy Drug Treatment Center in Miramar, California, but his article did not provide further information as to the results of the study and the Navy's actual role in the study. *See* Baumgartner, *supra* note 12, at 3.

[51] Telephone interview with Bruce Siggins, *supra* note 9.

[52] Psychemedics Corporation of Santa Monica, California, specializes in hair analysis. *See supra* note 3. Lifecodes Corporation of Valhalla, New York, has acquired the exclusive rights to use Psychemedics Corporation's specialized radioimmunoassay techniques but has no current plans to implement a hair analysis/drug detection program. Telephone interview with Michele Terry, Lifecodes Corporation, N.Y. (Apr. 9, 1990).

[53] Depending on volume, Psychemedics Corporation will perform a panel of five drug tests for $41-$65, plus an additional fee for confirmatory testing by gas chromatography/mass spectrometry. Price list provided by Psychemedics Corporation, effective March 15, 1990. *See supra* note 3 (address and phone number of Psychemedics Corporation). Because the Army routinely performs urinalysis testing, expense probably is not a major consideration in test requests.

[54] Dr. Baumgartner has developed a universal method for extracting the entrapped drug metabolites in hair. Following extraction, the method employs standard radioimmunoassay techniques. Dr. Baumgartner calls his methodology Radioimmunoassay of Hair (RIAH). RIAH is a registered trademark of the Psychemedics Corporation and a patent currently is pending for RIAH technology. Psychemedics includes this information in a packet that it will supply on request. *See supra* note 3 (address and telephone number of Psychemedics Corporation).

[55] *See supra* note 10.

[56] Baumgartner, Hill & Blahd, *supra* note 13, at 1439, fig. 1.

[57] Ishiyama, Nagai, & Toshida, *supra* note 8, at 384.

[58] Three experts, Bruce Siggins of the Fort Gillem CID laboratory, Roger Martz of the FBI laboratory, and Charles Midkiff of the BATF laboratory, when interviewed, noted the variables in hair growth rates and considered estimations pertaining to drug use, based on approximate hair growth rates, as imprecise and speculative. *See supra* notes 9, 12, 20 and accompanying text.

[59] *Id.*

[60] *See supra* note 49.

[61] For example, the detection of drug usage up to a year preceding collection of the hair sample would require a hair approximately six inches in length. Isikoff, *supra* note 38.

means of drug detection.[62] In a recent study by Dr. Baumgartner, which involved the use of both urinalysis and hair analysis to detect drug ingestion among federal parolees and probationers, Dr. Baumgartner found that hair analysis was more effective than frequent, unannounced urinalysis for detecting the use of cocaine, opiates, and PCP.[63] Urinalysis was more effective than hair analysis in detecting marijuana usage, though the results of both testing methods was comparable.[64] Despite its effectiveness as a means of detecting drug usage, however, the availability and expense of hair analysis have limited its employment to date. These practical problems aside, a matter of far greater concern to the trial attorney is the question of admissibility.

A recent research of caselaw, both civilian and military, failed to reveal a single reported case in which a court admitted hair analysis test results at trial. In its informational packet, Psychemedics Corporation, the forensic laboratory headed by Dr. Baumgartner, identifies four unreported cases in which judges admitted hair analysis results over objection.[65] Because these cases were unavailable to the author for analysis, what precedential value, if any, the cases may have is unknown. Also contained in Psychemedics' informational packet was a photocopy of a newspaper article that referenced an unreported Marine court-martial, *United States v. Piccolo*, in which defense hair analysis evidence allegedly was instrumental to the accused's acquittal of drug charges that the government had prosecuted based on a positive urinalysis.[66] Perusal of the article, however, revealed that the military judge refused to admit the results of hair analysis at trial; accordingly, practitioners only can speculate on how this unadmitted evidence could have affected the court's findings in *Piccolo*.

In the only found reported case to address the issue of hair analysis as a means of drug detection, the applicable issue was not admissibility of the test results, but whether, under civil rules of discovery, a court could compel a party to provide hair samples for testing. In *Burgel v. Burgel*[67]—a child custody and divorce action—the husband, through a request for discovery, sought to have the court order the wife to submit a hair sample for analysis.[68] The wife acknowledged that she previously used cocaine but claimed that she quit using the drug months before trial. The New York Supreme Court, Appellate Division, granted the husband's request, stating that the "novelty of the test is a concern which is relevant to admissibility, not to discovery."[69] The dissent, relying on the sworn statements of two scientific experts, each of whom expressed the view that radioimmunoassay testing of hair samples for the detection of cocaine was empirically unproven and not generally accepted as reliable by experts in the field, concluded that the husband had not established the threshold requirements of reliability and validity for admissibility.[70] While agreeing with the majority's view that the court need not determine the issue of whether or not hair analysis for drugs met the *Frye v. United States*[71] test of general scientific acceptance at that stage of the proceedings, the dissent nevertheless urged that the court should not use the liberal rules of discovery to sanction court-ordered examination or testing by "bizarre and unrecognized methods."[72]

Hair analysis, despite its proponents, obviously has not yet attained the status of general acceptance in the scientific community. Accordingly, it will continue to be, at least for the near future,[73] inadmissible in those courts applying the general acceptance test of *Frye*. Yet, every

[62] In a letter to Dr. Baumgartner, Dr. Linus Pauling, Research Professor at the Linus Pauling Institute of Science and Medicine, Professor Emeritus at Stanford University, former Professor of Chemistry at Oxford University, University of California, and the California Institute of Technology, and winner of the 1954 Nobel Prize in Chemistry and numerous other awards, to include the Linus Pauling Medal, opined that hair analysis is far more reliable than urinalysis for detecting drug use. A reprint of this letter appeared in the information packet that the author received from Psychemedics Corporation. *See supra* notes 54 and 3.

[63] Summary Report, *supra* note 5, at 3-4.

[64] *Id.*

[65] *See* People v. Korner, No. 154558, Santa Barbara Super. Ct., Cal. (1985); People v. Miel, No. A804003, Los Angeles Super. Ct., Cal. (1985); United Stated v. Boyle, No. CR85981R, U.S. District Court (1985) (further identification not provided); Alaska v. Majdic, No. K081-367CR, 3d Judicial D., Kodiak (1982).

[66] *See* Seff, *Tests Prove Innocence by a Hair*, San Diego Union Tribune, Jun. 15, 1987 (page unknown).

[67] 533 N.Y.S.2d 735 (N.Y. App. Div. 1988).

[68] In an affidavit submitted to the trial court, the husband stated that he had removed specimens of his wife's hair from the drains of a sink and a bathtub she had used, and had forwarded them to an expert for testing. Radioimmunoassay analysis of the specimens allegedly revealed "high, off-scale readings of cocaine or cocaine-related substances." Analysts, however, could not perform confirmatory testing by gas chromatography/mass spectrometry because of the inadequate size of the samples submitted. The court, therefore, ordered the wife to submit to a further, larger, sample. *Id.* at 738.

[69] *Id.* at 736-37.

[70] *Id.* at 737-38.

[71] 293 F. 1013 (D.C. Cir. 1923). The *Frye* test requires the proponent of evidence of a scientific nature to show that the principles or techniques from which analysts derived the evidence is "sufficiently established to have gained general acceptance in the particular field in which it belongs." 293 F. at 1014. *Burgel*, 533 N.Y.S.2d at 737-38.

[72] *Burgel*, 533 N.Y.S.2d at 739.

[73] The trial of Washington, D.C., Mayor Marion Barry on crack cocaine charges may have provided an impetus for greater acceptance of hair analysis as an established method of drug testing. Shortly after his arrest on January 18, 1990, agents escorted Mayor Barry to FBI headquarters where they collected hair samples from him. Isikoff, *supra* note 38. According to sources familiar with the case, FBI chemists, by mass spectrometry testing, allegedly were able to detect traces of cocaine and marijuana metabolites in Mayor Barry's hair. *Id.*

new development must have its first day in court,[74] and the military, which explicitly has rejected the *Frye* test "as an independent controlling standard of admissibility,"[75] would seem to be a logical forum for its introduction. Given the frequency with which the military litigates drug cases, the potential admissibility of hair analysis certainly warrants examination.

Hair analysis test results should be admissible at courts-martial, subject to two important limitations that this article will discuss later. Several reasons support admissibility. First, hair analysis is neither very new nor exceptionally novel. No significant distinction exists, in terms of scientific methodology, between urinalysis and hair analysis—both employ radioimmunoassay as a screening test followed by confirmatory testing by gas chromatography/mass spectrometry. Accordingly, hair analysis actually uses established techniques for the analysis of accepted evidentiary specimens.[76] Therefore, the same rules of evidence[77] that support the admissibility of urinalysis test results would be equally applicable to hair analysis.

Even though they employ the same scientific testing techniques, courts routinely admit urinalysis test results as evidence of drug ingestion, while they have yet to admit the results of drug testing by hair analysis. Two explanations for this apparent contradiction exist. Psychemedics Corporation,[78] which is in the forefront of hair analysis, normally tests submitted samples using only its own specialized radioimmunoassay screening techniques.[79] The company apparently does not perform confirmatory testing by gas chromatography/mass spectrometry "unless specifically requested."[80] In *Burgel*[81] the dissent sharply criticized the radioimmunoassay screening test used in hair analysis.[82] Similarly, in his concurring opinion in *United States v. Arguello*,[83] Judge Cox rejected the use of radioimmunoassay test results as evidence[84] and provided the following rationale:

> RIA screening is not a scientific test "reasonably relied upon by experts in the particular field in forming opinions or inferences." Mil. R. Evid. 703. That test is relied upon generally for the purpose of establishing the need for additional tests, such as the gas chromatography/mass spectrometry analysis. It is not relied upon by experts to determine use or nonuse of drugs.[85]

Apparently then, if hair analysis test results are to be admissible, courts will require confirmation by gas chromatography/mass spectrometry.[86]

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[74] United States v. Brown, 557 F. 2d 541, 558 (1977).

[75] United States v. Gipson, 24 M.J. 246, 251 (C.M.A. 1987).

[76] *See* Military Rule of Evidence 401, Manual for Courts-Martial, United States, 1984 [hereinafter Mil. R. Evid.]:

> Definition of "relevant evidence." "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Mil. R. Evid. 402:

> Relevant evidence generally admissible; irrelevant evidence inadmissible. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

Mil. R. Evid. 702:

> Testimony by experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Mil. R. Evid. 703:

> Basis of opinion testimony by experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[77] *See* Isikoff, *supra* note 38 (quoting Roger Martz, special agent in charge of FBI Laboratory Chemistry-Toxicology Unit: "Hair analysis is not a brand new technique. It's just using an established technique on hair samples ... that's the beauty of it").

[78] *See supra* note 3.

[79] *See supra* note 54.

[80] *See supra* note 3 (referencing information supplied in packet from Psychemedics Corporation).

[81] *See supra* note 68.

[82] 533 N.Y.S.2d at 738.

[83] 29 M.J. 198 (C.M.A. 1989).

[84] The specimen subjected to RIA testing in *Arguello* was urine. *See id.*

[85] 29 M.J. at 208 (footnotes omitted).

[86] *See* P. Giannelli & E. Imwinkelried, Scientific Evidence § 23-5, at 108-09 (Supp. 1988); Isikoff, *supra* note 38.

The second potential obstacle to the admissibility of hair analysis test results in courts-martial is the problem of articulating the purpose for which the moving party proffers this evidence. The ability of hair analysis to detect drug metabolites in hair is fairly well established; therefore, counsel seeking to use test results only for the limited purpose of establishing the presence of drug traces in an accused's body should be successful. However, the ability of hair analysis to quantify drug use with any degree of precision, in terms of the number of times the subject used drugs and the time periods during which use occurred, is questionable.[87] Accordingly, courts may hold that test results offered for those purposes lack the requisite reliability and validity for admission.

What then is the usefulness of hair analysis for the trial practitioner? At present, the answer must be that hair analysis is of limited value. Army laboratories currently do not perform hair analysis and apparently will not in the foreseeable future. The availability of testing will, therefore, be the greatest constraint on the use of hair analysis by Army lawyers. The limited purpose for which test results are likely admissible—that is, the mere presence of drug metabolites in the body—militates against the use of hair analysis in most circumstances because investigators generally can obtain the same positive test result through urinalysis.

The primary value of hair analysis for the trial counsel will accrue when persons handling urine specimens have lost or contaminated them, or when irregularities in the chain of custody necessitate retesting.[88] Actually, because of its wide window of detection, hair analysis then becomes even more suitable for retests than urinalysis, which only can detect short term usage.[89] Defense counsel also may find hair analysis to be helpful. For instance, the submission of a second urine specimen for testing by an accused—even if it proves to be negative for drug metabolites—normally will not disprove or refute a prior positive urinalysis because the body normally would have excreted the drug metabolites present during the first urinalysis prior to the collection of a second sample.[90] A retest by hair analysis, however, could be exculpatory because the wider window of detection in hair analysis normally would cover the same period in which a subject rendered a urinalysis—even if that urinalysis occurred several months earlier. In addition, retest by hair analysis may be the only option available to an accused in cases in which the tested urine specimen that served as the basis for the charges against the accused is no longer available for a retest.[91]

The true value of hair analysis, however, is not its usefulness for retest purposes, but its potential for quantifying drug use. If further refinement of the hair analysis methodology permits the forensic chemist reliably to identify the number of times a subject has used drugs by analyzing his or her hair segments, this type of evidence certainly will be significant in drug cases involving claims of innocent ingestion.[92] Test results indicating that a subject's drug use was only a singular occurrence may support a claim of innocent ingestion while, conversely, evidence of repeated use would refute that claim.

In conclusion, hair analysis is not a replacement for, but a complement to, urinalysis. Currently, it is useful as a safety net for urinalysis—primarily in the area of retests. It holds great promise in its purported ability to quantify drug use, but that potential remains unrealized. Counsel should recognize the current limitations of hair analysis and should attempt to employ hair analysis test results for the benefit of his or her client. By doing so, the wise counsel may hasten the day when courts routinely admit hair analysis test results.

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[87] *See supra* note 58.

[88] *Cf.* United States v. Layne, 29 M.J. 48 (C.M.A. 1989) (individuals removed urine samples from safe and substituted other samples before they mailed samples for testing); United States v. Pollard, 26 M.J. 947 (C.G.C.M.R. 1988) (urinalysis results suppressed at trial because of violations of procedural requirements for collection of urine specimens).

[89] *Contra Layne*, 29 M.J. 48; United States v. Joyner, 29 M.J. 209 (C.M.A. 1989); United States v. Bickel, 27 M. J. 638 (A.C.M.R. 1988). In all three of these cases, a second urinalysis resulted in a positive test result. The drug involved in each case, however, was marijuana, whose metabolite has a much slower excretion rate from the body than other drugs' metabolites. *See supra* note 38. Possibly, the accused in each case continued to use drugs during the interim period between tests.

[90] Defense counsel always must be mindful of the hazards of a retest. In *Joyner* the commander notified the accused that his urine sample had tested positive for the presence of marijuana. *See* 29 M.J. at 211. The accused proclaimed his innocence and offered to submit a second urine specimen, which also tested positive. The court-martial convicted the accused of two specifications of using marijuana.

[91] In United States v. Ozanich, 27 M.J. 585 (A.F.C.M.R. 1988), defense counsel requested that the government relinquish the specimen bottles so that the accused could have the urine samples privately retested. The government had tested the urine five months previous to this request and the specimen bottles appeared dry at the time of trial. The military judge denied the defense request, stating that the bottles no longer contained urine and any retest would, therefore, be of dubious reliability. *See Ozanich*, 27 M.J. at 587.

[92] *See, e.g.*, United States v. Scaff, 29 M.J. 60 (C.M.A. 1989) (accused claimed female at bar placed cocaine in his drink); United States v. Sparks, 29 M.J. 52 (C.M.A. 1989) (accused claimed unknown individual in bar placed cocaine in his drink while he was shooting pool); United States v. Spann, 24 M.J. 508 (A.F.C.M.R. 1987) (positive urinalysis for cocaine attributed to codeine medication prescribed for shoulder injury); United States v. Prince, 24 M.J. 643 (A.F.C.M.R. 1987) (accused alleged that his wife placed cocaine in his drink in an effort to improve his sexual performance); United States v. Domingue, 24 M.J. 766 (A.F.C.M.R. 1987) (accused admitted smoking marijuana but claimed, unbeknownst to him, someone treated it with cocaine).

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

Is It Really Aggravation?

Trial defense attorneys must be aware of the limitations imposed upon trial counsel during the presentencing phase of a court-martial when the government presents evidence of an accused's duty performance or potential for rehabilitation.[1] Rule for Courts-Martial 1001(b)(4), however, also allows the trial counsel to present evidence in aggravation of an accused's offense.[2] In many cases, the trial counsel presents this evidence in the form of opinion testimony from an accused's commander or first sergeant that addresses the affect an accused's offense has had on the unit. Unlike testimony of an accused's rehabilitative potential or duty performance, however, defense counsel may overlook the substance of the government's aggravation evidence and not give it the scrutiny it demands.

Trial defense counsel not only need to be vigilant in looking for improper duty and rehabilitation evidence, they also must ensure that evidence presented by the government in aggravation is proper and admissible. A recent decision by the Court of Military Appeals well illustrates this point.

In *United States v. Gordon*[3] the court addressed, *inter alia*, whether the trial judge improperly introduced testimony of the accused's brigade commander against the accused on sentencing. Finding prejudice to the accused, the court held that the brigade commander's testimony about the adverse impact of the offense on brigade members' confidence in one another and about the brigade's paramount concern for safety, was not admissible as evidence in aggravation because it did not relate directly to, or result from, the offense of which the court-martial convicted the accused.[4]

In *Gordon* the accused and two other soldiers rented a small rowboat and proceeded onto a lake in Germany. Once out on the lake, the accused and one of his friends began diving off the boat and climbing back in. They also splashed each other with water. As a result, the boat took on water and eventually capsized and sunk. The accused and his friend were able to swim to the nearby shoreline; however, the third soldier did not know how to swim and died by drowning after being thrown into the water when the boat capsized. The court-martial found the accused guilty of unlawfully killing the victim by negligence in violation of article 134 of the Uniform Code of Military Justice.[5]

During his testimony for sentencing, the accused's commander opined essentially that the accused's offense—of negligently diving off the boat and rocking the boat, thereby causing it to take on water, to sink, and to cause the drowning—undermined his soldiers' confidence in each other and compromised his transportation unit's "paramount" concern for safety. He further stated that this offense was well known in the command and that it was "exacerbated by its occurrence just after 'our drown proofing classes.'"[6]

In holding the testimony to be improper, the Court of Military Appeals stated that the standard for admissibility of evidence under Rule for Courts-Martial 1001(b)(4) "is not the mere relevance of the purported aggravating circumstance to the offense ... [but that] a higher standard is required."[7] This standard states that the "aggravating circumstances proffered must directly relate to or result from the accused's offense."[8]

Under the specific facts of the *Gordon* case, the court found that the commander's statements that the accused's offense had an adverse impact on his soldiers' confidence in one another were inadmissible because they did not

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[1] *See* United States v. Horner, 22 M.J. 294 (C.M.A. 1986); United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989). *See generally* DAD Note, United States v. Horner *Revisited*, The Army Lawyer, Aug. 1989, at 19.

[2] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(4) [hereinafter R.C.M.]. Evidence in aggravation may include "...evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense." R.C.M. 1001(b)(4) discussion.

[3] 31 M.J. 30 (C.M.A. 1990).

[4] *See* United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985); R.C.M. 1001(b)(4).

[5] Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1982) [hereinafter UCMJ].

[6] *Gordon*, 31 M.J. at 35.

[7] *Id.* at 36.

[8] *Id.*

relate directly to or result from the offense of which the court-martial found the accused guilty.[9] The trial court found the accused to have been negligent in his actions when he jumped off the boat and rocked the boat. The court did not find that the accused intentionally omitted or failed to help his fellow soldier once the accused discovered his fellow soldier's peril.

Likewise, the court found the commander's testimony that the accused's offense "undermined the paramount concern for safety" in his unit did not meet the requirement of Rule for Courts-Martial 1001(b)(4) that the adverse impact on the unit relate directly to, or result from, the accused's offense. In *Gordon* the negligent acts did not occur in the course of duties; rather, they occurred during off-duty, personal recreation time.

Finally, the court found that the way in which the commander presented his testimony raised the specter of unlawful command influence. A desire to "send a message" that the court-martial should punish the accused severely as an example and as deterrence apparently motivated the brigade commander's testimony.[10] His testimony did not impart any specific knowledge about the accused that would aid the members in their deliberations. The commander actually testified that he knew neither the accused nor the victim. He merely used his position as the accused's senior, brigade-level commander to discuss his view of the severity of the offense and to suggest to the panel that it should make an example of the appellant. As the court stated, "the 'lesson format' in which the prosecution chose to present the [commander's] testimony ... was clearly unacceptable."[11]

Gordon illustrates that defense counsel must prevent testimony from an accused's commander when that commander appears to be lecturing the members of the court-martial on the lessons they should draw from the accused's crime. Defense counsel must beware of "generalizations" of the effect of an accused's conduct on the military community or the unit—especially when the commander actually does not know the accused or the specific facts of a case, yet testifies on the adverse impact of the offense on his or her command. In addition, defense counsel need to be on the lookout for trial counsel who argue the ill effects of an accused's conduct when the government has not introduced evidence of an adverse impact before the court. Defense counsel should force trial counsel to limit testimony on the adverse impact of an accused's misconduct to evidence that relates directly to, or results from, the offense.

If the government apparently is about to offer questionable sentencing testimony, trial defense counsel should move to suppress it. For instance, if a senior field grade officer is about to testify, defense counsel could raise the possibility of command influence—especially if members from the witness's brigade or support elements are on the court-martial panel. Similarly, defense counsel should not overlook the possibility of a legal relevance objection.[12] A timely objection with a well-articulated basis possibly will keep that testimony out or, alternatively, will preserve the issue for appeal. Captain Michael J. Coughlin.

Specific Instances of Conduct: "Do Numbers Count?"

Consider the following situation. A court-martial finds an inmate confined in maximum custody at the United States Disciplinary Barracks (USDB) guilty of assaulting a prison guard. The trial counsel then presents the senior correctional officer at the USDB as the government's sole witness in aggravation. Apparently, the accused had been in maximum custody for more than a year and a half, and the trial counsel has called the senior corrections officer to explain why.

The trial defense counsel immediately objects to this witness on the grounds that the witness intends to discuss the accused's lack of rehabilitation potential, but has no personal knowledge of him. The military judge overrules the defense objection allowing the witness to testify based on the witness's review of the accused's prisoner records. When the witness attempts to explain why the accused has spent such an inordinately long period of time in maximum custody, the defense counsel objects again. The military judge tells the trial counsel that a "few more preliminary questions" are in order.

The witness then testifies that a Disciplinary and Adjustment Board (D and A board) is the primary tool for maintaining discipline at the USDB. The witness further notes that a D and A board determines an inmate's guilt or innocence of an alleged offense or rules violation and then makes recommendations concerning the appropriate disciplinary action that the USDB leadership should take.

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[9] *Id.*

[10] *See* United States v. Antonitis, 29 M.J. 217 (C.M.A. 1989) (testimony improper under R.C.M. 1001(b)(4) when used to demonstrate that appellant should not be retained in service, rather than to show impact of criminal conduct on mission).

[11] *Gordon*, 31 M.J. at 36.

[12] *See* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 403 [hereinafter Mil. R. Evid.].

Finally, the trial counsel asks the witness to tell the court-martial how many times the accused had appeared before a D and A board. Then, after another overruled defense objection, the witness states that the accused had appeared before nineteen D and A boards, that this was a high number of board appearances for an inmate, and that the reason the accused had spent such a long period of time in maximum custody was because D and A boards continually had recommended his retention there. Concerning rehabilitation potential, the witness then concludes by opining that he did not believe that the accused "will ever be a law abiding, tax paying, productive citizen."

This was the factual setting in *United States v. King*[13] in which the Court of Military Appeals affirmed the decision of the Army Court of Military Review[14] in holding that the government sentencing witness improperly referred to specific instances of conduct during direct examination. Under Rule for Courts-Martial 1001(b)(5),[15] which concerns "evidence of rehabilitation potential," trial counsel may not inquire into specific instances of conduct on direct examination.[16] Notably, the senior correctional officer in *King* did not detail any specific facts regarding instances of conduct that led to the D and A boards. The Court of Military Appeals, however, agreed with the Army court that the witness's failure to describe the accused's misconduct further was inconsequential. The court opined that, taken in context, the witness's testimony concerning the number of times the accused appeared before the D and A board "made it clear that the accused had spent the previous year and a half in maximum custody because of frequent misconduct as a prisoner."[17] The court considered that testimony impermissible and prejudicial to the accused and therefore set aside the sentence.[18]

The *King* case points out the importance of trial defense counsel protecting a client with less than a stellar background by making timely objections during presentencing proceedings. The appropriateness of the means of presentation of evidence on sentencing is often as important as the nature or substance of the evidence itself. In *King*, for example, Judge Cox's concurring and dissenting opinion noted that had the trial counsel presented the prison records containing the accused's past misconduct, the trial court properly may have admitted that form of evidence.[19] Therefore, to protect the client and preserve the issue for appeal, trial defense counsel must be quick to object whenever the type or purpose of the aggravation evidence violates a rule for sentencing procedures. Captain Alan M. Boyd.

"Sincerely Yours, ..."—No Escape Through Anonymity

In the recent case of *United States v. Ellis*[20] the Court of Military Appeals significantly expanded the reach of article 107 of the Uniform Code of Military Justice.[21] The issue in *Ellis* was whether a court-martial could consider, as a matter of law, an anonymous letter to be an official statement within the meaning of article 107.

Senior Airman Ellis was pending an administrative discharge from the Air Force because of his failure properly to maintain survival kits on various aircraft. The day before the Air Force was to discharge him, and with the aid of his girlfriend, Ellis wrote an anonymous letter to his first sergeant. The letter essentially sought to exonerate Ellis by placing blame for the deficiencies found in the survival kits on the supposed author of the anonymous letter.[22] Ellis hoped that by means of the anonymous letter he would exculpate himself on the previous derelictions, avert the pending administrative discharge, and obtain his restoration to duty. Unfortunately for him, the plan backfired and resulted in Ellis's trial by court-martial, not only for sabotage on two aircraft, but also for making a false official statement. The court-martial convicted him of making the false statement and of willfully damaging government property.

In determining whether a trial court ever could consider an anonymous statement to be "official" within the context contemplated by article 107, the Court of Military Appeals first reiterated that no official duty to make a statement is necessary to consider that statement "official."[23]

Rather, the controlling factor noted in the court's analysis in *Ellis* was that the letter also indicated that some survival kits were currently deficient and that responsible officials should check them. The court found that because Ellis intended for the first sergeant to take official action—that is, to check the survival kits—the court-martial could consider the anonymous letter to be a false

[13] 30 M.J. 334 (C.M.A. 1990).

[14] United States v. King, 29 M.J. 885 (A.C.M.R. 1989).

[15] R.C.M. 1001(b)(5).

[16] *See* United States v. Wingart, 27 M.J. 128 (C.M.A. 1988).

[17] *King*, 30 M.J. at 336.

[18] *Id.*

[19] *Id.* (Cox, J., concurring in part and dissenting to result).

[20] 31 M.J. 26 (C.M.A. 1990).

[21] UCMJ art. 107.

[22] *Ellis*, 31 M.J. at 26-27.

[23] *Id.* at 27; *see* United States v. Jackson, 26 M.J. 377 (C.M.A. 1988).

official statement. Therefore, because Ellis believed that the first sergeant or some other individual would take official action as a result of his letter, the letter was actually an "official" statement.[24]

The *Ellis* decision, which deals with a relatively novel issue, broadens the scope of article 107. Trial defense counsel should be aware of it when advising clients how to plead. The court in *Ellis*, however, left undecided the question of whether anonymous reports that an accused makes in response to solicitations for information are actionable. The court hinted that solicitations for information implicitly may carry with them a promise of immunity.[25] Captain Tamela J. Armbruster.

[24] *Ellis*, 31 M.J. at 28.

[25] *Id.*

Government Appellate Division Note

"Hard Blows" Versus "Foul Ones": Restrictions on Trial Counsel's Closing Argument

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Government Appellate Division

Introduction

Colonel Frederick Bernays Wiener succinctly has described advocacy as the "art of persuasion ... the process of persuading another, or others, in law always those who constitute a tribunal or fact-finding body, to agree with the position being advanced."[1] At trial, the most important position being advanced, in most cases, relates to the criminal liability of the accused. Counsel focus their advocacy skills on persuading the factfinder that the accused is either guilty or not guilty. Closing argument is the culmination of this effort and is the purest form of oral advocacy at trial.

The purpose of the closing argument is to permit counsel to summarize the evidence and to present argument in support of their respective positions. As a general matter, trial counsel and defense counsel are subject to the same limitations regarding the content of their closing arguments. Each may make only "reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of [the] party's theory of the case."[2] The trial counsel, however, is subject to special restraints. Like the United States Attorney described in *Berger v. United States*,[3] trial counsel is

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[4]

What is the difference between a hard blow and a foul one? The reference in the Manual for Courts-Martial (Manual) to "reasonable comment" provides little guidance[5] for trial practitioners, but conveys the point that the propriety of counsel's argument depends almost entirely upon the surrounding circumstances. Still, it is possible to identify arguments that invite reversal, or at least invite a finding of error, in almost any circumstance. This article discusses several of those situations.[6]

[1] Wiener, *Advocacy at Military Law: The Lawyer's Reason and the Soldier's Faith*, 80 Mil. L. Rev. 1, 5 (1978).

[2] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 919(b) [hereinafter R.C.M.].

[3] Berger v. United States, 295 U.S. 78, 88 (1935).

[4] *Id.*

[5] Of much greater value is the discussion related to R.C.M. 919(b). The discussion essentially summarizes case law addressing permissible argument by counsel.

[6] The focus of this article will be on trial counsel's closing argument on findings. In a few instances, however, sentencing arguments will be cited.

Commenting on the Accused's Failure to Testify

The leading case addressing a prosecutor's comment on an accused's failure to testify at trial is *Griffin v. California*.[7] *Griffin* involved a prosecution for capital murder. At trial, Griffin did not testify on the issue of guilt. In his closing argument, the prosecutor pointed out that Griffin "has not seen fit to take the stand and deny or explain" the allegations and argued that Griffin's silence was another indication that he was guilty.[8] A provision of the California Constitution specifically permitted this argument.[9]

The Supreme Court concluded that the prosecutor's comment violated Griffin's fifth amendment privilege against compelled self-incrimination. The Court characterized comment on an accused's silence as "a penalty imposed by courts for exercising a constitutional privilege" because it "cuts down on the privilege by making its assertion costly."[10] Responding to the state's argument that "the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and inevitable," the Court noted that this is not always true, as when an accused declines to testify out of concern that his prior convictions would be admissible.[11] In subsequent cases, the Court has endorsed the use of a cautionary instruction on an accused's election not to testify, holding that a trial judge must give the instruction on the accused's request[12] and may give it over an accused's objection.[13]

Though the *Griffin* rule has been applied in situations in which the prosecutor directly commented on the accused's failure to testify, it most frequently is invoked by defendants in cases in which the prosecutor has made a veiled reference to the accused's silence. For example, in *Lockett v. Ohio*[14] the prosecutor referred to the state's evidence as "unrefuted" and "uncontradicted." The Court held that these comments did not violate the fifth amendment because they "added nothing to the impression that had already been created by Lockett's refusal to testify after the jury had been promised a defense by her lawyer and told that Lockett would take the stand."[15] Most recently, the Court applied similar reasoning in determining that even a direct comment on the accused's failure to testify was justified when the defense counsel argued that the accused was not permitted to tell his side of the story.[16] The Supreme Court, however, has not decided whether a prosecutor's refering to the government's case as "unrefuted" or "uncontradicted" is permissible in the absence of a defense invitation to make such references.

The Court of Military Appeals also has not faced the issue directly but has intimated that reference to the evidence as uncontradicted or unchallenged, in cases in which the accused does not testify, is not per se error.[17] This is consistent with the holdings of the majority of other courts that have decided the issue.[18] Authority exists, however, for the proposition that references to the evidence as "uncontradicted," or like terms, are improper in situations in which the accused is the only person who could contradict the evidence. Thus, in *United States v. Cazenave*,[19] the board held that a trial counsel's reference to a witness's testimony as "uncontradicted" was improper when the only person who could

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[7] 380 U.S. 609 (1965).

[8] *Id.* at 611.

[9] *Id.* at 610 (citing Cal. Const. art I, § 13). *See generally* Tehan v. Scott, 382 U.S. 406 (1966) (discussing evolution of the *Griffin* rule).

[10] *Griffin*, 380 U.S. at 614.

[11] *Id.* at 614-15.

[12] Carter v. Kentucky, 450 U.S. 288 (1981).

[13] Lakeside v. Oregon, 435 U.S. 333 (1978); *cf.* Manual for Courts-Martial, 1984, Mil. R. Evid. 301(g) [hereinafter Mil. R. Evid.] (providing that defense counsel's election as to whether to give an instruction on the accused's failure to testify is binding on the military judge "except that the military judge may give the instruction when the instruction is necessary in the interests of justice").

[14] 438 U.S. 586 (1978).

[15] *Id.* at 595.

[16] United States v. Robinson, 485 U.S. 25 (1988). The Court found that the prosecutor's argument was a fair response to the defense counsel's argument. *Id.* at 34; *see also* United States v. Young, 470 U.S. 1 (1985) (finding that a prosecutor's expression of his personal belief in the accused's guilt and the credibility of witnesses, as well as his exhortation that the jury do its job, though improper, were invited by defense counsel's similarly improper arguments); Darden v. Wainwright, 477 U.S. 168 (1986) (holding that much of the prosecutor's argument, which included the comment that "[Darden] shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of the leash," was invited by, or was in response to, the defense summation). Military appellate courts also have followed the "invited response" doctrine. *See, e.g.*, United States v. Anderson, 30 C.M.R. 223 (C.M.A. 1961); *cf.* United States v. Robinson, 38 C.M.R. 496 (A.B.R. 1966).

[17] United States v. St. John, 48 C.M.R. 312 (C.M.A. 1974).

[18] *See* Annot., 14 A.L.R. 3d 723, 728, 763 (1967) & Supp. (1989), *cited in St. John*, 48 C.M.R. at 315.

[19] 28 C.M.R. 536 (A.B.R. 1959).

contradict the testimony was the accused. The board summarily concluded that "[c]learly the statement of the trial counsel was an unwarranted and improper comment by the trial counsel on the failure of the accused to take the stand."[20]

The better approach is to consider the trial counsel's reference in its context and then to determine whether it was "manifestly intended or was of such character that the triers of fact would naturally and necessarily take the [reference] to be a comment on the failure of the accused to testify."[21] That test, approvingly cited by the Court of Military Appeals,[22] focuses on the concern of the *Griffin* rule and provides a realistic standard for assessing whether it has been violated. As applied in *Gordon*, the test gives due deference to the evaluations of trial counsel's argument by the trial participants. Thus, when the accused's counsel does not object to trial counsel's argument, that failure is an indication that the prosecutor's remarks, as delivered, were not interpreted as a comment on the accused's failure to testify.[23]

In sum, a trial counsel's comment on the accused's failure to testify is rarely proper. Direct comment is forbidden unless the accused unmistakably invited the comment, and indirect comment is likewise improper. Whether a particular comment amounts to an improper reference to the accused's failure to testify is a fact-bound question. Trial counsel should err on the side of caution and avoid these comments, particularly in situations in which the accused is the only person who could contradict the government's evidence.[24]

Commenting on the Accused's Pretrial Silence

Military Rule of Evidence 301(f)(3) establishes that evidence of an accused's refusal to answer questions, invocation of the right to counsel, or request that questioning be terminated during "official questioning and in exercise of rights under the Fifth Amendment"[25] is inadmissible at trial. It follows, of course, that trial counsel may not comment on an accused's invocation of his rights during official questioning. More troublesome, however, is the question whether trial counsel may comment on an accused's silence before official questioning. Put another way, is an accused's failure to speak before official questioning admissible?

In *United States v. Noel*[26] the Court of Military Appeals answered that question in the negative. *Noel* involved a prosecution for, among other things, possession of marijuana. Customs inspectors discovered the marijuana after drug detection dogs alerted on a wooden elephant that Noel had in his baggage. At trial, Noel claimed that he did not know that the elephant contained marijuana and that he merely was carrying the object for a friend. On cross-examination, trial counsel probed this claim. He elicited that Noel was surprised when the marijuana was discovered in the elephant and asked Noel what he said to show his surprise.[27] A panel member asked a similar question, wondering "why if the elephant wasn't yours, you just didn't say, 'Hey, this isn't my elephant.' "[28] The court found that these questions constituted an impermissible attempt to "impeach or undermine the credibility of an accused by reference to, or utilization of, his decision to refuse to incriminate himself which flowed from his rights under Article 31, UCMJ, and the Fifth Amendment."[29] The court rejected the government's argument that the questions were not improper because they focused on Noel's silence before he was advised of his article 31(b) rights, pronouncing that the argument "ignore[s] the congressional mandate expressed in article 31, and ... totally emasculate[s] the protections of that provision which in this aspect are broader than those delineated by the Supreme Court under *Miranda* and its progeny."[30] The court did not

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[20] *Id.* at 543-44; *see also* cases cited in Annot., *supra* note 17, at 730-39; *contra* cases cited *id.*, at 739-45.

[21] Knowles v. United States, 224 F.2d 168, 170 (10th Cir. 1955) (citation omitted).

[22] United States v. Gordon, 34 C.M.R. 94, 98 (C.M.A. 1963).

[23] *Id.* at 99; *see also* United States v. James, 24 M.J. 894 (A.C.M.R. 1987) (finding that trial counsel's reference to the evidence as "uncontradicted" was not a comment on the accused's failure to testify when the military judge and trial defense counsel apparently did not consider the remark as such a comment); United States v. Ziegler, 14 M.J. 860 (A.C.M.R. 1982) (trial counsel's reference to defense documentary evidence as the "only evidence" presented by the defense was not an improper comment on the accused's failure to testify); *accord* United States v. Hamilton, 41 C.M.R. 970 (A.F.C.M.R. 1970), *aff'd*, 42 C.M.R. 283 (C.M.A. 1970).

[24] *See* R.C.M. 919(b) discussion ("trial counsel may not comment on the accused's exercise of the right against self-incrimination [and]... may not argue that the prosecution's evidence is unrebutted if the only rebuttal could come from the accused.").

[25] Mil. R. Evid. 301 (f)(3); *see also* Doyle v. Ohio, 426 U.S. 171 (1975); United States v. Ross, 7 M.J. 174 (C.M.A. 1979); United States v. Brooks, 31 C.M.R. 9 (C.M.A. 1961).

[26] 3 M.J. 328 (C.M.A. 1977).

[27] *Id.* at 329.

[28] *Id.*

[29] *Id.* at 330.

[30] *Id.* (footnote omitted).

explain why the protections of article 31(b) are "broader in this aspect" than the protections of the fifth amendment. In each instance, the protections are only triggered by official questioning.[31] The court simply held that no distinction exists between pre-warning and post-warning silence—in both situations the accused's silence is not admissible.

The Supreme Court, interpreting the fifth amendment, has taken a different view. In *Fletcher v. Weir*[32] the Court ruled that an accused's post-arrest but pre-warning silence could be used to impeach him at trial. Police arrested Weir and charged him with a homicide that occurred in a fight outside a bar. Following the arrest, but before police advised him of his constitutional rights, Weir remained silent. At trial, Weir testified that he had killed in self-defense, and the prosecutor attempted to impeach him with his post-arrest silence.[33] The Court found that this impeachment did not violate due process because Weir had not yet been advised of his rights and, therefore, he had no affirmative governmental assurance that silence would not be used against him.[34] In *Jenkins v. Anderson*,[35] a case decided before *Weir*, the Court applied similar reasoning in holding that the government could impeach Jenkins—who claimed self-defense in a murder prosecution—by establishing that for two weeks after the homicide, and prior to his arrest, Jenkins did not approach the police and tell his account of the incident. The Court explicitly rejected the contention that impeachment with prior silence impermissibly burdened the exercise of fifth amendment rights, stating that "the constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'"[36] The Court stated that a criminal defendant must consider the risk of impeachment by pre-warning silence in deciding whether to testify.[37]

Whether the Court of Military Appeals will overrule *Noel* in light of *Weir* and *Jenkins* is, of course, an open question. Certainly, a strong argument exists for the military rule and federal rule to be the same—especially because article 31 does not address pre-warning silence. Indeed, the court frequently has applied Supreme Court precedent when article 31 does not specifically address an issue.[38] Moreover, the rules of evidence provide for the admissibility of admissions by silence.[39] It seems likely, therefore, that the court will follow *Weir* and *Jenkins* if confronted with the issue. Nevertheless, for now, *Noel* is the law and trial counsel should not elicit or comment upon an accused's pre-warning silence.

Expression of Personal Beliefs and Opinions

A trial counsel may not express a personal opinion "as to the truth or falsity of testimony or evidence or the guilt of the defendant."[40] The rationale for this prohibition was summarized succinctly by the Supreme Court in *United States v. Young*:[41]

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.[42]

An additional, and perhaps more persuasive, rationale for the rule is that a trial counsel's opinion regarding the accused's guilt or the credibility of a witness is simply irrelevant. That a partisan advocate believes a witness or thinks the accused is guilty does not make it more probable that the witness is telling the truth or the

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[31] *See* United States v. Loukas, 29 M.J. 385 (C.M.A. 1990).

[32] 455 U.S. 603 (1982).

[33] *Id.* at 603-04.

[34] *Id.* at 606.

[35] 447 U.S. 231 (1980).

[36] *Id.* at 236 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973)).

[37] *Id.* at 238.

[38] *See, e.g.*, United States v. Jones, 26 M.J. 353 (C.M.A. 1988) (signaling probable application of the "public safety" exception to article 31(b) warning requirements).

[39] Mil. R. Evid. 801(a), (d); *cf.* United States v. Cain, 5 M.J. 844 (A.C.M.R. 1978) (finding no error in trial counsel's argument that the accused's failure to respond to an accusation made by a robbery victim was an admission by silence).

[40] 1 A.B.A. Standards for Criminal Justice § 3-5.8(b) (2d ed. 1980).

[41] 470 U.S. 1, 18 (1985).

[42] *Id.*

accused is guilty.[43] Whatever the rationale for the rule regarding personal opinions, the rule, as applied by the courts, is straightforward—a trial counsel may comment on the evidence but he or she may not express a personal opinion regarding the evidence.

United States v. Knickerbocker[44] is representative of the cases in which the Court of Military Appeals has found a violation of the personal opinion rule. The trial counsel in that case labeled the accused's testimony a "fairy tale" that he found "insulting" and commented that "having listened to all of the evidence in this case, there is very little doubt, *in fact in my mind there is no doubt whatsoever*, that the man sitting over there at the defendant's table, Mr. Terry Knickerbocker, was in fact the individual who was involved in this matter as a principal."[45] The court found that trial counsel impermissibly expressed his personal opinion of the accused's guilt, and the court reached the "uncomfortable conclusion" that reversal was required despite the lack of objection.[46] The common feature of *Knickerbocker* and other cases in which the courts have found a violation of the personal opinion rule[47] is that the trial counsel made it clear that he or she was expressing a personal opinion rather than arguing from the evidence.

United States v. Doctor[48] illustrates this critical distinction. Lieutenant Colonel (LTC) Doctor was charged with false swearing and wrongfully instructing an employee to testify falsely. At trial LTC Doctor testified and "flatly contradicted the Government witnesses."[49] Trial counsel called LTC Doctor "a psychopathic liar and a schemer who would falsify to anyone."[50] The court noted that in his closing argument trial counsel referred to LTC Doctor as a liar "some twenty times" on one page of the record.[51] The court found these comments permissible and detailed its reasoning in language that bears repeating:

> When the making of a false official statement is the offense to be proven and there are facts to support the charge, trial counsel is within the limits of reasonable persuasion if *he calls the defendant a liar.* Moreover, the posture of the evidence in this instance was such that either the witnesses for the Government or the accused were falsifying, and the prosecutor had a right to argue that his witnesses were telling the truth and the defendant was prevaricating. Obviously, the crime charged plays a decided part in the thrust of counsel's argument, and to deny the representative for the Government the right to call an accused a liar in a perjury or closely allied case, would seal his mouth to a point where he could only identify the crime by the loftiest of words. While we do not encourage the use of denunciatory comments, they may be used when they describe accurately the crime committed and when their use finds support in the testimony. Here, for the most part, the comments were well within the limits set out above.[52]

Thus, though the line between an impermissible personal opinion and a permissible comment on the evidence is a fine one, it is one that is easily drawn. Trial counsel may say, for example, that the accused is a liar, provided some evidence to that effect exists, but he or she cannot say "I think the accused is a liar" or "it is clear to me that the accused is a liar." Likewise, trial counsel emphatically can state that the accused is guilty and can argue the credibility of witnesses, but he or she cannot express a personal belief as to whether the accused is guilty or the witness is a liar. Trial counsel should remember the distinction and think twice before succumbing to the temptation to tell the factfinder how he or she feels about the case. Reversal of a conviction is a high price to pay for venting your feelings in court.

Arguing Facts Not in Evidence

That counsel may not argue facts not in evidence is fundamental. Thus, in *United States v. Clifton*[53] the court

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[43] *Cf.* Mil. R. Evid. 401 (definition of relevant evidence).

[44] 2 M.J. 128 (C.M.A. 1977).

[45] *Id.* at 129.

[46] *Id.* at 129-30.

[47] United States v. Falcon, 16 M.J. 528, 530-31 (A.C.M.R. 1983); *see* United States v. Clifton, 15 M.J. 26, 28-30 (C.M.A. 1983); United States v. Horn, 9 M.J. 429 (C.M.A. 1980). For an extreme example of a prosecutor's expression of his personal opinion, see Greenberg v. United States, 280 F.2d 472 (1st Cir. 1960) in which the prosecutor referred to himself as the "thirteenth juror." *See also* Gradsky v. United States, 373 F.2d 706, 710 (5th Cir. 1967) ("the government representatives don't put a witness on the stand unless there appears to be some credibility, until he appears to be a truthful witness").

[48] 21 C.M.R. 252 (C.M.A. 1956).

[49] *Id.* at 260.

[50] *Id.* at 259.

[51] *Id.*

[52] *Id.* at 260; *see also* United States v. Ziegler, 14 M.J. 860, 863-64 (A.C.M.R. 1982) (holding that prosecutor's use of "I" 21 times in argument not error).

[53] 15 M.J. 26, 28-29 (C.M.A. 1983).

found that the trial counsel in a rape prosecution erred by detailing "common rape fantasies" and by alluding to inadmissible evidence that, though not admitted, would have "shown all the facts in the case." Similarly, in *United States v. Falcon*[54] the court disapproved of a trial counsel's argument that the accused's assault "[p]robably wasn't his first time actually" because, the court noted, no other evidence of assaultive behavior was presented. The self-evident reason for the prohibition on arguing facts not in evidence relates to the accused's right to confront the government's witnesses and probe their credibility. As the court explained in *Clifton*:

> Arguments are not given under oath, are not subject to objection based upon the rules of evidence, and are not subject to the testing process of cross-examination. If the rule [prohibiting arguing facts not in evidence] were contrary, an accused's right of confrontation would be abridged, and the opportunity to impeach the source denied.[55]

Trial counsel, however, should not be unduly intimidated by the popular interruption, "Objection, arguing facts not in evidence." Counsel are not restricted to dry recitations of the evidence. He or she can urge the panel members to draw legitimate inferences[56] from the evidence, can appeal to common sense, and may cite matters of common knowledge. Applying these principles, courts have permitted trial counsel to: 1) compare the accused to Benedict Arnold and Richard Nixon who, like the accused, engaged in misconduct that was inconsistent with their "good character";[57] and 2) call the accused a child abuser when evidence demonstrated that the accused's child, who died from a blow to his chest, suffered from battered child syndrome.[58] The point is, while the trial counsel may argue his or her understanding and interpretation of the evidence in "blunt and emphatic" terms,[59] the argument must be fairly connected to the evidence.[60] Counsel should be particularly cautious about insinuating that the accused previously has engaged in conduct similar to the charged misconduct when no supporting evidence exists.

Commenting on Military-Civilian Relations

In a surprising number of cases,[61] military appellate courts have held improper trial counsel's commenting on the possible effects of the court-martial's decision on relations between the military and surrounding communities. Illustrative is *United States v. Cook*,[62] which involved a prosecution for voluntary manslaughter stemming from a barroom fight in the Philippines. In his closing argument on findings, trial counsel stated:

> This is a tremendously important case. As I told you before, this case is important because we're trying a man who is here accused of killing a Philippine national, at which we're using mostly Filipino witnesses. I think that we can show everyone concerned with this case, that we can ensure that justice can be done. And that's the important thing.[63]

The court interpreted these comments as an "appeal to a court-martial to predicate its verdict upon the probable effect of its action on relations between the military and civilian community," which "exceed[ed] the bounds of fair comment and injected improper matter into the case."[64] Civilian courts have reached similar conclusions regarding appeals to a juror's "civic duty" to convict.[65]

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[54] 16 M.J. 528, 530 (A.C.M.R. 1983); *see also* United States v. Simmons, 14 M.J. 832 (A.C.M.R. 1982) (improper for trial counsel to argue that absence of defense character witness showed that accused was a bad soldier); United States v. Tawes, 49 C.M.R. 590 (A.C.M.R. 1974) (error for trial counsel to argue that he could have called additional witnesses on certain issue); United States v. Rutherford, 29 M.J. 1031 (A.C.M.R. 1990) (error for trial counsel to insinuate during sentencing argument that accused was guilty of other misconduct).

[55] *Clifton*, 15 M.J. at 29. Trial counsel also may not misstate the law or evidence. *See, e.g.*, United States v. Gifford, 41 C.M.R. 537 (A.C.M.R. 1969) (error for trial counsel to make critical misstatement of content of order in prosecution for violating the order).

[56] An inference is defined as "a process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted." Black's Law Dictionary 700 (Rev. 5th ed. 1979).

[57] United States v. Jones, 11 M.J. 829, 832 (A.F.C.M.R. 1981).

[58] United States v. White, 23 M.J. 84 (C.M.A. 1986).

[59] United States v. Turner, 17 M.J. 997 (A.C.M.R. 1984).

[60] *See Rutherford*, 29 M.J. at 1030 (trial counsel argued how the government thought the crime occurred, but the record contained no evidence tending to support the government's theory).

[61] United States v. Boberg, 38 C.M.R. 199 (C.M.A. 1968); United States v. Cook, 28 C.M.R. 323 (C.M.A. 1959); United States v. Hurt, 27 C.M.R. 3 (C.M.A. 1958); *see also* United States v. Ernst, 17 M.J. 835 (C.G.C.M.R. 1984); United States v. Poteet, 50 C.M.R. 73 (N.M.C.M.R. 1975).

[62] 28 C.M.R. 323 (C.M.A. 1959).

[63] *Id.* at 326.

[64] *Id.* at 326-27.

[65] *See, e.g.*, People v. McNaspie, 261 A.D. 657, 660, 27 N.Y.S. 2d 906, 909 (1941) (prosecutor referred to acquittal as a "terrible shame and expense to the county"); Pennington v. State, 171 Tenn. Crim. App. 130, 131, 345 S.W.2d 527, 528 (1961) ("The people of Nueces County expect you to put this man away"); *cf.* Viereck v. United States, 318 U.S. 236, 247-48 n.3 (1943) (prosecutor informed jury that "[t]he American people are relying upon you ladies and gentleman for their protection against this sort of a crime as much as they are relying upon the protection of the men who man the guns in Bataan Peninsula, and everywhere else").

Inflammatory Argument

A trial counsel may not do or say anything in argument that is "calculated to inflame the passions or prejudices of the jury."[66] Distinguishing between unduly inflammatory argument and fair comment, as one might imagine, can be difficult. For example, in the area of characterizing the accused or his conduct, military and civilian courts have permitted a great variety of disparaging language. Courts have held that calling the accused a "most beastly old Mr. Hyde,"[67] a "closet homosexual,"[68] a "rattlesnake,"[69] a "fiendish ghoul,"[70] "a true monster with a rancid, rotten mind,"[71] "a big ape and gorilla,"[72] "a vicious murderous pig,"[73] "a slimy beast,"[74] and a "mad dog"[75] is permissible. Other courts, however, have condemned similar references, such as "cheap, slimy, crook";[76] "a junky rat, and sculptor with a knife";[77] a "deviant sex fiend";[78] a "pervert," "weasel," and "moron" who "would rape a dog and would rape each and every member of the jury";[79] and "lower than the bone belly of a cur dog."[80] Appellate courts apparently are more lenient in allowing government counsel to make such comments during sentencing arguments than during findings arguments. Reviewing courts also appear to allow government counsel more discretion in the absence of objections by the defense. Trial counsel, however, should attempt to tailor the rhetoric to the facts and remember that an appellate court may scrutinize that rhetoric.

One form of argument is likely to be deemed unduly inflammatory under any circumstances: asking the members to place themselves in the shoes of the victim. In *United States v. Shamberger*[81] the court condemned this type of argument. In *Shamberger* the trial counsel, arguing for a stiff sentence for rape, stated to the panel members:

> Put yourself in the position that Shamberger says Sergeant Crawford was put, right here. Put yourself next to your car or a borrowed car at night; put yourself being forced down by one or two men, big men; picture being told to keep your head down but being able to glance out from the side; and picture your wife having her clothes ripped off her and then being raped, once, twice, three times, four times, five times. You picture that. That's not a bar down on Hay Street.... You think of Sergeant Crawford pinned to the ground and in no way able to do anything about three men taking turns.[82]

Finding that this argument "exceeded the bounds of propriety" and created a "fair risk of prejudice,"[83] the court ordered a sentence rehearing. The court cited its reasoning in a previous case when it noted:

> to ask a court member to place himself in the position of a near relative wronged by the accused is to invite him to cast aside the objective impartiality demanded of him as a court member and judge the issue from the perspective of personal interest.[84]

In short, the Golden Rule[85] has no place in argument.

Conclusion

Though the precise value of closing argument is difficult to determine, counsel rarely overlook the

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[66] United States v. Nelson, 1 M.J. 235, 237-38 n.3 (C.M.A. 1975) (quoting ABA Standards, The Prosecution Function § 5.8(c) (1971)).

[67] United States v. McPhaul, 22 M.J. 808 (A.C.M.R. 1986).

[68] United States v. Vilches, 17 M.J. 851, 855 (N.M.C.M.R. 1984), *pet. denied*, 19 M.J. 57 (1984).

[69] Commonwealth v. Narr, 173 Pa. Super. 148, 153, 96 A.2d 155, 156 (1953).

[70] Cronnon v. Alabama, 587 F.2d 246, 251 (5th Cir.), *cert. denied*, 440 U.S. 974 (1979).

[71] United States v. Cook, 432 F.2d 1093 (7th Cir. 1970).

[72] Downie v. Burke, 408 F.2d 343 (7th Cir. 1969).

[73] People v. Gairson, 246 Cal. App. 2d 343, 54 Cal. Rptr. 731 (1966), *cert. denied*, 389 U.S. 915 (1967).

[74] People v. Myers, 35 Ill. 2d 311, 220 N.E.2d 297 (1966).

[75] State v. Bradford, 256 S.C. 51, 180 S.E.2d 632 (1971).

[76] Volkmor v. United States, 13 F.2d 594, 595 (6th Cir. 1926).

[77] People v. Hickman, 34 A.D.2d 831, 312 N.Y.S. 2d 644 (1970).

[78] United States v. Quarles, 25 M.J. 761, 774-75 (N.M.C.M.R. 1987).

[79] People v. Carreau, 27 Ill. 2d 388, 189 N.E.2d 287, 289 (1963).

[80] State v. Smith, 279 N.C. 163, 181 S.E.2d 548 (1971).

[81] 1 M.J. 377 (C.M.A. 1976); *see also* United States v. Wood, 40 C.M.R. 3 (C.M.A. 1969); United States v. Begley, 38 C.M.R. 488 (A.C.M.R. 1966).

[82] *Shamberger*, 1 M.J. at 379.

[83] *Id.*

[84] *Id.* (quoting *Wood*, 40 C.M.R. at 8).

[85] "As ye would that men should do to you, do ye also to them likewise." Luke 6:31 (King James); Matthew 7:12. In the context of closing argument, particularly in civil cases, the Golden Rule has been defined as "a suggestion to the jury by an attorney that the jurors should do unto others, normally the attorney's client, as they would have others do unto them"—that is, place yourself in the victim's shoes in deciding damages. Annot., *Propriety and Prejudicial Effect of Attorney's "Golden Rule" Argument to a Jury in a Civil Case*, 68 A.L.R. Fed. 333 (1984).

opportunity to argue a case[86] in strong terms. As Judge Learned Hand observed:

> It is impossible to expect that a criminal trial shall be conducted without some show of feeling; the stakes are high, and the participants are inevitably charged with emotion. Courts make no such demand; they recognize that a jury inevitably catches this mood and that the truth is not likely to emerge, if the prosecution is confined to such detached exposition as would be appropriate in a lecture, while the defense is allowed those appeals in misericordiam which long custom has come to sanction. The question is always as to the particular incident challenged, in the setting of the whole trial.[87]

Few forms of speech, therefore, are per se error. Nevertheless, several general restrictions apply to a trial counsel's closing argument. Like the rules of evidence, the restrictions essentially define relevant considerations in argument. The restrictions do not prevent vigorous presentation of the government's case. Rather, they help the trial counsel distinguish "hard blows" from "foul ones"—a distinction that can make a difference on appeal.

[86]Commenting on the importance of defense counsel's closing argument, former Chief Judge Quinn wrote:

> The right—and duty—of defense counsel to present a closing argument is not to be lightly brushed aside. Where the case is long and hotly contested, and a planned strategy has been pursued by defense, the closing argument may be crucial. Out of the wealth of testimony adduced, defense must bring together the portions that are favorable to the accused and present them in a light that will appear most convincing to the triers of fact. If this is not done by defense counsel, there is a danger that the court may not understand or appreciate the defense theory. It is not exaggeration to say that many criminal cases are won for the accused in the course of closing argument. United States v. Sizemore, 10 C.M.R. 70, 72 (C.M.A. 1953).

[87]United States v. Wexler, 79 F.2d 528, 529-30 (2d Cir. 1935), *cert. denied*, 297 U.S. 703 (1936).

Trial Defense Service Notes

The Post-Trial Authority of the Military Judge

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Introduction

The trial is finished. While preparing post-trial matters for your client, you discover new evidence that would have affected the findings and sentence. What do you do? Do you document the issue for corrective action by the convening authority and appellate courts? Does a better alternative exist?

Your research discloses that the Court of Military Appeals discussed the military judge's post-trial authority in *United States v. Scaff*.[1] *Scaff* tells trial judges to use their expansive post-trial power to remedy trial defects that prejudice the accused.

As a perceptive defense counsel, you recognize the message being given to all defense counsel. Specifically, the trial is not necessarily over when the sentence is announced. Second, the defense counsel must understand trial judges' post-trial authority and exercise due diligence in performing post-trial duties. Finally, a defense counsel's failure to exercise due diligence in post-trial actions invites appellate action.[2]

This paper discusses post-trial proceedings available to the defense counsel and to trial judges under Rule for Courts-Martial 1102.[3] Specifically discussed are post-trial article 39(a)[4] sessions, *DuBay*[5] hearings, and proceedings in revision.[6] This paper will not discuss the convening authority's post-trial options or the procedures for rehearing under R.C.M. 810.[7]

Post-trial Sessions Under R.C.M. 1102

General

R.C.M. 1102 governs post-trial sessions. Based on the language of R.C.M. 1102(d) and case law, trial judges have independent authority, before authentication of the record, to conduct a post-trial article 39(a) session, a

[1]United States v. Scaff, 29 M.J. 60 (C.M.A. 1989).

[2]United States v. DeGrocco, 23 M.J. 146, 148 n.4 (C.M.A. 1987).

[3]Manual for Courts-Martial, 1984, Rule for Courts-Martial 1102 [hereinafter R.C.M.].

[4]Uniform Code of Military Justice, art. 39(a), 10 U.S.C. § 839 (1982) [hereinafter UCMJ]; R.C.M. 803; R.C.M. 1102.

[5]United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967). In *DuBay* the Court of Military Appeals was presented with the problem of how to resolve an allegation of unlawful command influence. They resolved the problem by directing an impartial convening authority to convene a general court-martial for another trial. At that trial, the law officer (military judge) would hear the parties' contentions, hear testimony, and receive evidence. At the conclusion of the hearing, the law officer was to enter findings of fact and conclusions of law. If the law officer found that the original proceedings were tainted by unlawful command influence, he was to set aside the findings or sentence and proceed with a rehearing.

[6]R.C.M. 1102.

[7]R.C.M. 810; *see also* Peace, *Post-Trial Proceedings*, The Army Lawyer, Oct. 1985, at 20 (good discussion regarding rehearings as well as other post-trial proceedings).

DuBay hearing, or a proceeding in revision.[8] This authority is available even though an article 73[9] petition for a new trial could be filed.[10] R.C.M. 924(c) does not prevent the exercise of this authority, even though it states that a military judge sitting alone may reconsider any finding of guilty at any time before the sentence is announced.[11]

The main purpose of a post-trial proceeding is to remedy defects at the trial level rather than to wait for an appellate authority to take action.[12] Other purposes include resolving defects in the record of trial;[13] to do justice;[14] to remove ambiguities or omissions in the record; and to dispose of a claim of error before material witnesses become unavailable, memories fade, and evidence is lost.[15] Finally, the military judge should take post-trial action whenever possible because the accused may not receive meaningful relief from any other authority.[16]

A few limitations are common to all three post-trial proceedings. First, post-trial sessions may not reconsider a finding of not guilty or a ruling that equates to a not guilty finding of any specification.[17] In addition, post-trial sessions may not reconsider a finding of not guilty on any charge unless a finding of guilty to a specification of the charge that alleges a violation of the Uniform Code of Military Justice is entered.[18] Finally, unless a mandatory sentence is required, the post-trial session may not increase the severity of the adjudged sentence.[19]

Historical Evolution of the Power

Our current military judge evolved from the position of "law officer."[20] The law officer's role was to advise the court-martial in all matters of form and law and to present the case for the government. In addition, if the accused had no defense counsel, the law officer was responsible for protecting the accused's interests while keeping in mind his duties as a prosecutor.[21]

Congress, through the enactment of the Uniform Code of Military Justice (UCMJ), made the law officer independent by excluding that individual from the actual membership of courts-martial.[22] Federal courts have determined that Congress intended that the law officer be the counterpart of the civilian federal judge.[23] The term "law officer" eventually was replaced by the term "military judge" by enactment of the Military Justice Act of 1968.[24] This change further supported the court's interpretation that Congress meant for the military judges to have the same powers, including post-trial powers, as their civilian counterparts.[25]

Appellate courts, consistent with this interpretation, repeatedly have stated that the military judge's powers are broad. For example, the Court of Military Appeals, in *United States v. Griffith*,[26] stated that even after the sentence is announced, the military judge, like a civilian judge, has the power to dismiss a specification for which the proof is legally insufficient.[27] The Court of Military Appeals also has held that the military judge can grant a mistrial, even though the President, through the Manual for Courts-Martial (Manual), apparently granted that power only to the convening authority.[28] Finally, in *United States v. Strand*[29] the Court of Military Appeals stated that the law officer has the authority to reserve a decision on a motion to dismiss a specification until after a finding of guilty by the members, even though the Manual for Courts-Martial contains no such provision.[30]

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[8] R.C.M. 1102(d).

[9] UCMJ art. 73.

[10] *Scaff*, 29 M.J. at 64, 65.

[11] United States v. Washington, 23 M.J. 679, 681 (A.C.M.R. 1986) (urging that R.C.M. 924(c) should be construed to be consistent with R.C.M. 1102 and holding that R.C.M. 924(c) does not state that a judge may not reconsider findings of guilty after the sentence is announced).

[12] United States v. Griffith, 27 M.J. 42, 47 (C.M.A. 1988).

[13] United States v. Anderson, 12 M.J. 195 (C.M.A. 1982), *cited in* United States v. Brickey, 16 M.J. 258, 264 (C.M.A. 1983).

[14] *Scaff*, 29 M.J. at 65.

[15] *Brickey*, 16 M.J. at 258, *cited in Griffith*, 27 M.J. at 46 *and* United States v. Dorsey, 26 M.J. 538, 540 (A.F.C.M.R. 1988).

[16] *Griffith*, 27 M.J. at 47.

[17] UCMJ art. 60(e)(2)(A); R.C.M. 1102(c)(2).

[18] UCMJ art. 60(e)(2)(B); R.C.M. 1102(c)(2).

[19] UCMJ art. 60(e)(2)(C); R.C.M. 1102(c)(3).

[20] *Griffith*, 27 M.J. at 45.

[21] *Id.*

[22] Manual for Courts-Martial, United States, 1969 (Rev. ed.) [hereinafter MCM, 1969]; *Griffith*, 27 M.J. at 45; *Brickey*, 16 M.J. at 263.

[23] *Griffith*, 27 M.J. at 48; *Brickey*, 16 M.J. at 263; United States v. Biesak, 14 C.M.R. 132, 140 (C.M.A. 1954).

[24] *Griffith*, 27 M.J. at 45; *Brickey*, 16 M.J. at 263.

[25] *Brickey*, 16 M.J. at 258, *cited in Griffith*, 27 M.J. at 46.

[26] *Griffith*, 27 M.J. at 42.

[27] *Id.* at 48. A judge cannot, however, become the "13th juror" by substituting his judgement as to the credibility of the witnesses; credibility is solely an issue for court-martial members. *Id.*

[28] United States v. Stringer, 17 C.M.R. 122 (C.M.A. 1954), *cited in Griffith*, 27 M.J. at 45.

[29] United States v. Strand, 20 C.M.R. 13 (C.M.A. 1955).

[30] *Id.*, *cited in Griffith*, 27 M.J. at 46.

Appellate courts have continued to expand the powers of the military judge through case law. Many of the cases send trial judges a clear message to use their post-trial power to remedy prejudicial trial defects. The message for defense counsel is to be alert and to seek post-trial hearings aggressively when warranted. Post-trial sessions are discussed below.

Article 39(a) in General

Post-trial article 39(a) sessions are the most potent of the three post-trial sessions discussed in this paper. To understand the scope of post-trial article 39(a) sessions, one must understand both R.C.M. 803—the section governing article 39(a); and R.C.M. 1102—the rule governing post-trial sessions.

R.C.M. 803 empowers the detailed military judge to conduct a formal court-martial session known as an article 39(a) session. The trial judge conducts this session as part of the record of trial[31] without members and with the accused, defense counsel, and trial counsel present.[32] The military judge may conduct an article 39(a) session pretrial, during the trial, and post-trial.[33]

The general purpose of the article 39(a) session is to allow the military judge to resolve issues that arise *before* his authentication of the record of trial.[34] These matters could include issues of unlawful command influence,[35] continuances,[36] challenges,[37] statutes of limitation,[38] former jeopardy,[39] pleas of the accused,[40] availability of witnesses and evidence,[41] refusal of a witness to appear or to testify,[42] contempts,[43] requests for depositions,[44] admissibility of records,[45] and a request for a new trial based on the discovery of new evidence.[46]

R.C.M. 1102: The Post-trial Article 39(a)

Before authenticating the record of trial,[47] the trial judge can direct a post-trial article 39(a) session to inquire into and correct any matter that arose before, during, or after the trial that affects the legal sufficiency of the findings or the sentence.[48] This power includes providing proper instructions to members and allowing the members to deliberate in closed session to determine whether corrective action is appropriate.[49]

The Manual does not define or limit the scope of post-trial article 39(a) sessions.[50] Because of the general, unrestricted language of article 39(a), court interpretations play an important role in defining the limits—or lack thereof—of post-trial article 39(a) sessions. The following analysis of *Scaff* and other cases discloses the legal and factual basis that counsel must allege to prevail during post-trial sessions.

The Case of United States v. Scaff

Technical Sergeant Scaff, a member of the United States Air Force, was convicted by a special court-martial for using cocaine.[51] After trial, but before the trial judge's authentication of the record, the defense requested a post-trial article 39(a) session based on newly discovered evidence.[52] The new evidence was that a female secretly had placed cocaine in Scaff's drink.[53] The defense counsel told the trial judge that he discovered the evidence when a witness came forward after the trial.[54] Based on the defense counsel's statements, the trial judge conducted a post-trial article 39(a) session. The military judge ordered the production of the defense witness. The convening authority, however, decided not

[31] R.C.M. 803.

[32] *Id.* R.C.M. 804 and 805 discuss the requirements for the presence of the accused, military judge, and counsel at court-martial proceedings. Both R.C.M. 804 and 805 list exceptions to the general rule that the accused, military judge, and counsel be present at all court-martial proceedings. *See* R.C.M. 804; R.C.M. 805.

[33] *Brickey*, 16 M.J. at 258, *cited in Griffith*, 27 M.J. at 46.

[34] *Scaff*, 29 M.J. at 66; UCMJ art. 39(a); R.C.M. 803.

[35] UCMJ art. 37.

[36] UCMJ art. 40.

[37] UCMJ art. 41.

[38] UCMJ art. 43.

[39] UCMJ art. 44.

[40] UCMJ art. 45.

[41] UCMJ art. 46.

[42] UCMJ art. 47.

[43] UCMJ art. 48.

[44] UCMJ art. 49.

[45] UCMJ art. 50.

[46] *Scaff*, 29 M.J. at 66.

[47] R.C.M. 1102(d).

[48] R.C.M. 1102(b)(2); R.C.M. 1102 analysis.

[49] R.C.M. 1102(b)(2); R.C.M. 1102 analysis.

[50] R.C.M. 1102(b)(2). R.C.M. 1102 analysis states in the introductory portion that the post-trial article 39(a) session authorizes the court to address matters that are not subject to the proceedings in revision and that may affect the legality of the findings or of the sentence.

[51] *Id.* at 61.

[52] *Id.* at 62.

[53] *Id.*

[54] *Id.* at 64.

to fund the travel of the witness from Kentucky to Utah, the site of the trial. The issues then became whether the military judge could: 1) exercise any power after the accused had been found guilty and had been sentenced; 2) abate the proceedings; and 3) set aside the findings of guilty and the sentence.

At the hearing the trial judge questioned each counsel about the scope of his post-trial powers. In response, the defense stated that he could cite no specific precedent concerning the military judge's authority to dismiss the charges.[55] The trial counsel opined that the judge, lacking the authority to dismiss the proceedings, must forward the case to appellate authorities.[56] The trial counsel argued that the unjust impact on the accused caused by any resultant delays would be minor because the accused already had served two months of his three-month sentence.[57]

The military judge decided that abating the proceeding would not provide any real remedy to the accused.[58] The military judge stated that he had no authority to dismiss the charges or to reconsider and change the findings.[59]

The Court of Military Appeals, however, overturning the decision of the United States Air Force Court of Military Review,[60] stated that the trial judge had the authority to take post-trial corrective action to remedy trial defects. The court's decision in *Scaff* was based on Rules for Courts-Martial 803, 1102, and 1210, and case law.[61] The court reasoned that R.C.M. 1102(b)(2) allows the judge, before he authenticates the record, to conduct a post-trial article 39(a) session to inquire into, and take any action necessary to resolve, any post-trial issue that affects the legal sufficiency of the findings and sentence.[62] The court further reasoned that evidence that constitutes grounds for a new trial under R.C.M. 1210(f) could qualify as a matter affecting the legal sufficiency of either the findings or the sentence.[63] The court concluded that, before the record of trial is authenticated, the trial judge may conduct a post-trial session to consider the newly discovered evidence and, if appropriate, set aside findings and the sentence.[64]

The Court of Military Appeals ordered the trial judge to conduct a *DuBay* hearing to gather evidence upon which to base a decision whether the findings and sentence should be overturned.[65] Based on that hearing, the military judge was to determine whether the evidence was newly discovered, whether the defense had exercised due diligence, and whether the newly discovered evidence would have produced a substantially more favorable result or an acquittal.[66]

The factors listed by the Court of Military Appeals in *Scaff*[67] that justify post-trial corrective action are: 1) new evidence; 2) due diligence; and 3) substantially different results.[68] All three factors must be substantiated by defense counsel to justify post-trial corrective action.

New evidence is defined as evidence that is discovered after the trial.[69] Discovering the evidence after the trial is the key. If the defense should have or could have discovered the evidence during the trial, post-trial relief may be denied. This new evidence can be any type of evidence. For example, new evidence could include jury misconduct,[70] misleading instructions,[71] insufficient evidence,[72] evidence attacking the credibility of a witness,[73] and fraud on the court.[74]

Defense counsel must be prepared to show the trial judge, during the post-trial hearing, that due diligence was exercised in preparation for and during the trial. The defense, while exercising due diligence, must not have been able to discover the evidence prior to or during the trial.[75] Due diligence is defined as an aggressive pursuit

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[55] *Id.* at 63.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 64.

[59] *Id.*

[60] United States v. Scaff, 26 M.J. 985 (A.F.C.M.R. 1988) (holding that R.C.M. 924(c) permits reconsideration only prior to sentencing). R.C.M. 1102 does not permit a proceeding in revision to be conducted for the purpose of presenting additional evidence. *Id.* The only authority of the trial judge was to conduct a post-trial session (*DuBay* hearing), make the evidence a part of the record, and forward the record to the appropriate authority for corrective action. *Id.*

[61] *Id.* at 65 n.3 (listing the basis for a new trial under R.C.M. 1210).

[62] *Scaff*, 29 M.J. at 65, 66; *see also Griffith*, 27 M.J. at 47; R.C.M. 1102(b)(2).

[63] *Scaff*, 29 M.J. at 65, 66; R.C.M. 1102.

[64] *Id.* at 65.

[65] *Id.* at 65, 66, 67.

[66] *Id.* at 67.

[67] *Id.*

[68] *Id.* at 65.

[69] *Id.* at 65, 66.

[70] *Griffith*, 27 M.J. at 47.

[71] *Id.*

[72] *Id.*

[73] United States v. Bacon, 12 M.J. 489, 491 (C.M.A. 1982).

[74] *Scaff*, 29 M.J. at 66 n.3; R.C.M. 1210(f).

[75] *Scaff*, 29 M.J. at 64; *Bacon*, 12 M.J. at 491; United States v. Thomas, 11 M.J. 135, 137 (C.M.A. 1981).

of evidence.[76] For example, the defense must use due diligence and ensure that the government complies with its discovery request.[77] Defense counsel's failure to ensure that the government complies with the defense's discovery request may waive any type of post-trial relief.

In addition, the new evidence must produce a "substantially more favorable result."[78] The court in *Scaff* created some ambiguity regarding what constitutes a substantially more favorable result. At one point, the court stated that the new evidence must produce an acquittal. Analysis of *Scaff* and the cases discussed below indicates that the defense need only show that the case result would be changed substantially by the new evidence—not that an acquittal would occur. The accused's burden of persuasion, however, is greater than for "normal appellate issues."[79]

Cases Supporting Scaff

The expansive judicial post-trial power announced by *Scaff* is not a new message. Past appellate court rulings consistently have instructed trial judges to take corrective action to remedy prejudicial defects. The cases discussed below provide a solid base for the court's decision in *Scaff* and emphasize the message to defense counsel and trial judges alike.

In *Griffith* the judge denied a defense motion for a finding of not guilty after completion of the government's case. After the members found the accused guilty, the judge stated that he believed the verdict was not consistent with the evidence and the demeanor of the witnesses.[80] He also stated that the evidence did not persuade him beyond a reasonable doubt that the accused was guilty.[81] Consistent with the government's position, the judge stated that he was powerless to overturn the verdict or entertain a motion for a directed verdict.[82] The *Griffith* court held that the military judge may determine whether the rights of the accused have been prejudiced by some error in the findings or the sentence.[83] If a prejudicial error is substantiated, the judge has the authority to take corrective action.[84]

In *United States v. Carr*[85] the trial judge received an unsigned letter from a court member stating that the president of the court-martial pressured other members to vote for a conviction contrary to the military judge's instructions.[86] The military judge, in a post-trial article 39(a) session, stated that he did not think that he had the power to take any corrective action.[87]

The Court of Military Appeals stated that the trial judge in *Carr* had "misperceived his power."[88] The trial judge should have held a post-trial article 39(a) session to investigate whether the accused was prejudiced.[89] If the judge discovered a prejudicial trial defect, the findings could be set aside.[90]

In an earlier case, *Brickey*, trial counsel withheld information impacting on the credibility and the competence of a key government witness.[91] The defense counsel

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[76] United States v. Ruhling, 28 M.J. 586, 590 (N.M.C.M.R. 1988).

[77] United States v. King, 27 M.J. 545, 550 (A.C.M.R. 1988) (forcing the government to comply with defense's discovery request probably would have turned up the evidence).

[78] *Scaff*, 29 M.J. at 65, 66 (stating that the new evidence must produce an acquittal); *Bacon*, 12 M.J. at 491; *King*, 27 M.J. at 550 (new evidence or fraud must have a "sufficiently significant impact to produce a different result"). Analysis of the case law indicates that "produce a different result" does not mean "produce an acquittal." Based on case law, the phrase probably means to produce a substantially different result that is favorable to the accused.

[79] *Bacon*, 12 M.J. at 491.

[80] *Griffith*, 27 M.J. at 44.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 48.

[84] *Id.*

[85] United States v. Carr, 18 M.J. 297 (C.M.A. 1984).

[86] *Id.* at 300, 302.

[87] *Id.*

[88] *Id.* at 302.

[89] *Id.*

[90] *Id.*

[91] *Brickey*, 16 M.J. at 259.

requested that the judge conduct a post-trial article 39(a) session or *DuBay* hearing so that he could "hear evidence, make findings of fact, enter conclusions of law, and ... order any relief he deems warranted."[92] Believing he was without this power, the judge denied the defense's request.[93]

The Court of Military Appeals stated that most courts generally agree that the military judge's powers do not cease with the announcement of the sentence.[94] The court went on to state that the Military Justice Act of 1968 gave the military judge the power to conduct an article 39(a) session without any express limitation. The court also suggested that the military judge has post-trial powers usually enjoyed by his civilian judicial counterpart.[95] Furthermore, the court held that the judge can convene an article 39(a) session even if the members cannot be reassembled.[96]

The Court of Military Appeals stated that new evidence regarding the credibility of a witness can be evidence that would produce a different result. Just because the members believed the key government witness when impeachment evidence A and B was presented, does not mean they would believe the witness when impeachment evidence C was added.[97]

Finally, in *Washington*, the accused was convicted of distributing a controlled substance. Six days after the trial, the defense counsel discovered that the accused actually distributed a non-controlled substance.[98] The defense counsel requested a post-trial article 39(a) session to submit new evidence and to have the judge reconsider the findings and sentence.[99] The judge ruled that he was without authority to reconsider the findings after announcement of the sentence because of the limitations of R.C.M. 924(c).[100] Notwithstanding these apparent limitations, the judge conducted a hearing, allowed each side to introduce additional evidence on sentencing, and heard additional sentencing arguments. Based on the additional evidence, the judge announced that he would have adjudged six months less confinement if the new evidence had been known.[101] According to the limitations of R.C.M. 924(c), however, the judge again stated that he could take no corrective action. Therefore, any corrective action had to be taken by the convening authority or the appellate courts.

Contrary to the trial judge's belief, the Army Court of Military Review held that the judge misperceived the scope of his authority.[102] The court concluded that the judge had the authority to take corrective action. In this case, however, because the convening authority approved the judge's revised findings and sentence, no corrective action was necessary.

Summary of the Law Regarding Post-trial Article 39(a) Sessions

Post-trial article 39(a) sessions provide an effective mechanism to remedy immediately prejudicial trial defects. Defense counsel must be sensitive to post-trial discoveries and ensure that potential post-trial issues are pursued aggressively. Defense counsel need to be creative because post-trial article 39(a) corrective powers can apply to virtually any type of defect.

These corrective powers are not available, however, unless defense counsel meet certain threshold requirements. First, counsel must show that the new evidence was discovered after the trial ended. Second, counsel must show that the evidence was not discoverable during the trial by exercising due diligence. Finally, counsel must convince the judge that the new evidence would result in a substantially more favorable finding or sentence.

If, for whatever reason, the trial judge will not grant a post-trial article 39(a) session, defense counsel should request a *DuBay* hearing or a proceeding in revision.

The *DuBay* Hearing

The Court of Military Appeals established the "*DuBay* hearing" in the case of *United States v. DuBay*. The *DuBay* hearing is a fact-gathering procedure used to document facts at the trial level so that the appellate courts have sufficient information to take appropriate corrective

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[92] *Id.*

[93] *Id.* at 261.

[94] *Id.* at 263; *see also Washington*, 23 M.J. at 681 (judge misconceived the scope of the powers available to him after the trial had ended).

[95] *Brickey*, 16 M.J. at 263.

[96] *Id.*

[97] *Id.* at 265, 266; *see also Bacon*, 12 M.J. at 491 (examining issue of credibility and whether newly discovered evidence would produce more favorable results).

[98] *Id.*

[99] *Id.* at 679, 680.

[100] *Id.* at 680.

[101] *Id.*

[102] *Brickey*, 16 M.J. at 263, *cited in Washington*, 23 M.J. at 681.

action on appeal. In *DuBay* the court ordered the law officer at the trial level to conduct a hearing on the contested issues, to permit the presentation of evidence, and to enter findings of fact and conclusions of law.[103] If the law officer found that the original trial was deficient, he was ordered to set aside the findings and sentence, as required, to rectify the defect.[104] Corrective action was predicated upon a grant of post-trial authority by the Court of Military Appeals. Accordingly, this authority contrasts with the trial judge's independent power under R.C.M. 1102 to take post-trial corrective action under article 39(a).

A *DuBay* hearing is available even though the Manual for Courts-Martial contains no such provision.[105] The federal courts also recognize that the military's *DuBay* hearing is an effective mechanism to correct trial defects.[106] The result of the *DuBay* hearing, however, is not enforceable if it would cause material prejudice to the substantial rights of the accused.[107] For example, newly discovered aggravation evidence that would increase the sentence would not be allowed to be presented.

DuBay hearings have been used to gather evidence to document and clarify an appealable issue.[108] This procedure also has been used to determine whether the accused was insane,[109] whether the accused was prejudiced by not having access to an informant,[110] whether reasons for post-trial delay existed,[111] and whether the accused understood his right to counsel.[112]

In summary, *DuBay* hearings are another tool for the trial judge and defense counsel to use in documenting any type of issue or defect for *appellate action*. This hearing, if used at the trial level, documents issues or defects so the trial record, on appeal, contains current, accurate evidence. The record of the hearing, therefore, prevents the loss or destruction of that evidence due to passing of time, lapses of memory, or other similar occurrences. Most accuseds probably would agree that corrective action at a later date is better than no corrective action at all.

The Proceeding in Revision

If defense counsel cannot convince the trial judge to conduct and take corrective action in a post-trial article 39(a) session or, in the alternative, to document evidence in a *DuBay* hearing for appellate review, counsel should request that the judge conduct a proceeding in revision. Despite its limitations, a proceeding in revision offers the trial judge and defense counsel an effective tool to document issues and defects and to correct *minor* trial defects.

Conducted as a part of the original trial,[113] a proceeding in revision can correct "apparent error(s), omission(s), or improper or inconsistent action(s) by the court-martial" that do not materially prejudice the accused.[114] New evidence cannot be presented in this proceeding.[115] The Court of Military Appeals interpreted this to preclude the presentation of new evidence on the issue of guilt or innocence.[116] The court further stated that it would reconsider new evidence in a proceeding in revision to allow other corrective action to be taken.[117]

Trial courts can use proceedings in revision even if some of the originally detailed court members are absent, as long as the minimum number of court members are present.[118] Court members may consider any corrective action in closed session.[119] A different judge may preside

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[103] *DuBay*, 37 C.M.R. at 413.

[104] *Id.*

[105] *Brickey*, 16 M.J. at 264, 265.

[106] Scott v. United States, 586 F. Supp. 66, 69 (E.D. Va. 1984); *see also* Peace, *supra* note 7, at 23.

[107] *Barnes*, 44 C.M.R. at 223, *cited in Roman*, 46 C.M.R. at 78, *and Brickey*, 16 M.J. at 264, 265.

[108] *Scaff*, 29 M.J. at 67 (military judge is allowed to determine whether new evidence existed, whether the defense exercised due diligence, and whether the new evidence would produce an acquittal); United States v. Roberts, 18 M.J. 192, 193 (C.M.A. 1984); *see also* Peace, *supra* note 7, at 23.

[109] *King*, 24 M.J. at 779 (includes two appendices on what the *DuBay* hearing should determine).

[110] United States v. Kilebrew, 9 M.J. 154, 162 (C.M.A. 1980); Peace, *supra* note 7, at 23.

[111] United States v. Lucy, 6 M.J. 265 (C.M.A. 1979); Peace, *supra* note 7, at 23.

[112] United States v. Vasquez, 19 M.J. 729, 732 (N.M.C.M.R. 1984); Peace, *supra* note 7, at 23.

[113] United States v. Steck, 10 M.J. 412, 414 (C.M.A. 1981) (proceeding in revision, instead of ordering a rehearing upon the sentence, was used to correct the deficiencies in the plea); *see also* Peace, *supra* note 7, at 24.

[114] *Barnes*, 44 C.M.R. at 223, *cited in Roman*, 46 C.M.R. at 78 *and Brickey*, 16 M.J. at 264, 265; United States v. Dorsey, 26 M.J. 538, 540 (A.F.C.M.R. 1988) (proceeding cannot be used as means of correcting a "substantive error" in the trial); UCMJ art. 60(e)(2); R.C.M. 1102(b)(1).

[115] R.C.M. 1102(b)(1) discussion.

[116] *Brickey*, 16 M.J. at 258.

[117] *Id.* at 261, 264.

[118] *Id.* at 258, *cited in Griffith*, 27 M.J. at 46; R.C.M. 1102(e)(1)(A)(i).

[119] R.C.M. 1102(e)(2).

over a proceeding in revision if the original judge is not reasonably available.[120]

Proceedings in revision have been used to correct non-prejudicial errors, such as errors by the military judge in a pretrial agreement inquiry,[121] the accused's misunderstandings of his rights to counsel,[122] mistakes in the announcement of findings[123] and sentence,[124] and minor mistakes in the military judge's sentencing instructions.[125] This procedure also has been used to reconsider and revise a sentence after striking a portion of inadmissible evidence that was reconsidered[126] and to resolve an ambiguity in the announcement of the forfeiture portion of a sentence.[127]

The results of a proceeding in revision also can be used to justify a reversal on appeal. One case was reversed because the bailiff informed the jurors that he believed the accused was guilty. A panel's knowledge of newspaper accounts of the trial provided the basis for a reversal in another trial. In still another case, the post-trial discovery that one of the panel members knew personal information about the accused's background provided grounds for a reversal.

Despite the wide range of defects that can be corrected, post-trial proceedings in revision have definite limitations. A court *cannot* use proceedings in revision if any part of the sentence has been ordered executed.[128] Additionally, proceedings in revision cannot be used to correct an error made by the military judge in failing to instruct on an element of the offense charged[129] or a lesser-included offense,[130] or in omitting an instruction to court members.[131]

In summary, proceedings in revision offer military judges a flexible tool to correct minor trial defects. As with the article 39(a) session and *DuBay* hearing, appellate courts have expanded the scope of proceedings in revision through case decisions.

Conclusion

Post-trial article 39(a) sessions, *DuBay* hearings, and proceedings in revision provide the means to take corrective action to remedy prejudicial trial defects. Defense counsel must understand the purpose of each to ensure that their clients are represented effectively.

Immediate corrective action can be obtained by using a post-trial article 39(a) session. The basic requirements for using a post-trial article 39(a) session are simple. First, the military judge must order the session before he has authenticated the record of trial. Second, defense counsel must convince the military judge that new evidence exists. Third, defense counsel must convince the judge that due diligence would not have revealed the newly discovered evidence during trial. Fourth, the defense must convince the judge that the new evidence will result in a substantially different finding or sentence. Defense counsel must be prepared to present evidence on each of these requirements during the post-trial session.

Immediate corrective action by the judge in a post-trial session is beneficial to all. The government benefits because the case may not be reversed and remanded on appeal. The defense benefits because the accused obtains immediate relief. Finally, the legal system benefits because justice is done.

If defense counsel cannot convince the trial judge to convene a post-trial article 39(a) session, the defense should ask for either a post-trial *DuBay* hearing or a proceeding in revision. Despite the limitations of *DuBay* hearings and proceedings in revision, they are effective forums to document trial defects for appellate review. Proceedings in revision also can be used to correct minor trial defects. All three post-trial procedures offer defense counsel the opportunity to represent the accused aggressively after the trial is over. Effective use of these procedures requires defense counsel to be sensitive to post-trial issues. Once an issue is discovered, defense counsel must raise the issue expeditiously. Defense counsel also must ensure that sufficient evidence and facts to support the corrective action are documented on the record. By following these procedures, defense counsel substantially increase the possibility that the accused will obtain relief from prejudicial trial defects.

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[120] R.C.M. 1102(e)(1)(A)(ii).

[121] *Steck*, 10 M.J. at 414; R.C.M. 1102(b)(1) discussion; *see also* Peace, *supra* note 7, at 24.

[122] *Dorsey*, 26 M.J. at 540 (judge conducted a proceeding in revision, notwithstanding that he called it when he sought to clarify a mixed question of law and fact with respect to a pretrial agreement); *Barnes*, 44 C.M.R. at 224; *see also* Peace, *supra* note 7, at 24.

[123] United States v. Downs, 15 C.M.R. 8 (C.M.A. 1954).

[124] United States v. Massey, 17 M.J. 683 (A.C.M.R. 1983); United States v. Liberator, 34 C.M.R. 279, 284 (C.M.A. 1964); United States v. Hollis, 29 C.M.R. 51, 53, 54 (C.M.A. 1960); United States v. Robinson, 15 C.M.R. 12, 17 (C.M.A. 1954); *see also* Peace, *supra* note 7, at 24.

[125] United States v. Staruska, 4 M.J. 639, 641, 642 (A.F.C.M.R. 1977); United States v. Worsham, 10 C.M.R. 653, 656, 657 (A.B.R. 1953); *see also* Peace, *supra* note 7, at 24 (addressing issue of judge's failure to instruct on an element of the offense).

[126] United States v. Carpenter, 36 C.M.R. 24 (C.M.A. 1965).

[127] United States v. Feld, 27 M.J. 537, 538 (A.F.C.M.R. 1988).

[128] R.C.M. 1102(d).

[129] *Worsham*, 10 C.M.R. at 656; United States v. Stubblefield, 2 C.M.R. 637, 638 (A.B.R. 1951). *But see* United States v. Mead, 16 M.J. 270, 275, 276 (C.M.A. 1983); *Staruska*, 4 M.J. at 641, 642.

[130] United States v. Evans, 5 C.M.R. 585, 587 (C.M.A. 1972).

[131] *Roman*, 46 C.M.R. at 81.

Use of Article 32 Testimony at Trial—A New Peril for Defense Counsel

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In a number of recent decisions, the Court of Military Appeals considered the issue of the government's use at trial of article 32[1] testimony of unavailable witnesses. These cases were *United States v. Arruza*,[2] *United States v. Conner*,[3] *United States v. Hubbard*,[4] and *United States v. Spindle*.[5] In each of these cases, the court held that the trial court properly admitted article 32 testimony because it satisfied the requirements of Military Rule of Evidence 804(b)(1)[6] and the confrontation clause of the sixth amendment to the United States Constitution.[7] These decisions significantly alter the nature of the article 32 investigation for the accused and counsel.

Article 32 of the Uniform Code of Military Justice (UCMJ) directs that a convening authority may not refer a charge or specification to a general court-martial for trial until an officer conducts a thorough and impartial investigation of all the matters set forth therein. This investigation includes an inquiry into the truth of the allegations set forth in the charges and consideration of the form of the charges.[8] In addition, the report of investigation must include a recommendation for disposition.[9]

Traditionally, the article 32 served several purposes. First, it questioned whether probable cause that tended to show that the accused committed an offense existed. Second, it reviewed the form of the charges. Third, it gave the convening authority an independent officer's recommendation on what he or she should do with the charges. Fourth, and most important to the defense, it afforded wide ranging discovery of the government's case and other evidence useful to the defense at trial.

Typically, the article 32 is the first formal proceeding in the court-martial process. It takes place early in the defense counsel's dealing with the case. The government normally attempts to schedule the article 32 proceedings for the earliest possible date after a preferral of charges. Often this is just a few days after the commander reads the charges to the accused. Indeed, the government often will set the date for the article 32 hearing before the defense counsel even knows that the case or client exists. Sometimes the defense counsel learns of a case when the investigating officer (IO) calls to confirm a previously scheduled hearing.

Government counsel, on the other hand, is aware of the potential case from the moment someone reports it to government agents or when government agents discover evidence of misconduct. From the outset, the trial counsel assists investigators in building the government's case. He directs the vast resources of the government with the sole aim of securing a conviction at the envisioned court-martial. The trial counsel controls the entire process, to include preferring charges and notifying the defense. In particular, the trial counsel will time these events to maximize the government's advantage. Unless the suspect seeks out a lawyer, or the law requires the government to provide the accused with counsel for significant events—such as entry into pretrial confinement, an interrogation, or a lineup—the defense counsel does not participate in, and is often unaware of, early case investigation.[10] Faced with the systemic pressure for haste and the early disparity in knowledge of the case between the government and defense, defense counsel often agree to an early article 32 hearing, valuing the article 32 investigation's discovery function as the primary benefit to the accused.

Although the article 32 investigation is not designed to allow the government to have a "dry run" to perfect its case,[11] trial counsel often use it to do just that. The investigating officer's recommendations, discourse on probable cause, and comments on the form of the charges become secondary to the government's desire to see how its evidence unfolds. Trial counsel can then use the time before court-martial to shore up weak spots or otherwise dispose of the case without a contest.

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[1] Uniform Code of Military Justice art. 32a, 10 U.S.C. § 832 (1982) [hereinafter UCMJ].

[2] 26 M.J. 234 (C.M.A. 1988).

[3] 27 M.J. 378 (C.M.A. 1989).

[4] 28 M.J. 27 (C.M.A. 1989).

[5] 28 M.J. 35 (C.M.A. 1989).

[6] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 804(b)(1) [hereinafter Mil. R. Evid.].

[7] U.S. Const. amend VI.

[8] UCMJ art. 32a; Manual for Courts-Martial, United States, 1984, Rules for Court-Martial 405 [hereinafter R.C.M.].

[9] *Id.*

[10] To adapt to this situation, many defense counsel have developed techniques and alternative sources of information to learn about criminal investigations within their area of responsibility before notification by the trial counsel.

[11] *See* R.C.M. 405 discussion.

Until recently, the defense bar's approach to the article 32 hearing reflected the demands of the practice and the potential gains to the accused of an early pretrial investigation. Typically, defense counsel went to the article 32 hearing with a mind towards gaining useful discovery of evidence and an evaluation of the strengths and weaknesses of the government's case. Rarely was the article 32 proceeding approached by the defense with an intent similar to that at trial—that is, to get an acquittal. Unlike a court-martial, defense counsel normally did not judge the success of an article 32 investigation on a win-loss basis. Rather, defense counsel often evaluated the article 32 hearing on how much he or she learned about the government's case. The test was what information could the defense obtain to help it ultimately win at court-martial or achieve a beneficial disposition of the case. Similarly, defense counsel at an article 32 proceeding generally tried to conceal their case strategy from the government to preserve the effectiveness of the defense theory for trial—the only meaningful forum. This technique usually prohibited an aggressive article 32 cross-examination. An impeaching cross-examination, for instance, may tip the defense counsel's hand to the government prior to trial, giving the trial counsel plenty of time before court for "damage control."

The drafters of Military Rule of Evidence 804(b)(1) recognized the difference between a defense counsel's motive to cross-examine at the pretrial investigation and his or her motives at trial.[12] They understood that the article 32 investigation was valuable to the defense for discovery, and because of this, article 32 discovery-directed cross-examination could be significantly different from cross-examination at trial. In line with this realistic view of the practice, the drafters acknowledged that prior article 32 testimony may not fulfill the similar motive requirement of 804(b)(1) and the sixth amendment. The drafters' solution to the question of when prior article 32 testimony of an unavailable witness would be admissible under 804(b)(1) was dependent upon the defense counsel's purpose for the article 32 cross-examination. If defense counsel intended the cross-examination to impeach, then a similar motive existed as required by 804(b)(1). If, on the other hand, the cross-examination was for discovery, then it did not meet the similar motive requirement. To ensure a trial judge later called upon to decide this question understood the defense counsel's motive at the article 32 proceeding, the drafters suggested that defense counsel state on the record at the article 32 hearing when he or she intended the cross-examination to be for discovery purposes.[13] If, under the drafters' guidance, a defense counsel used the article 32 investigation for discovery, the defense did not have to worry about use of that testimony at trial.

Recognizing the difference in motive to cross-examine at an article 32 hearing and a court-martial, and relying on the drafters' analysis of Military Rule of Evidence 804(b)(1), defense counsel were able to maximize the discovery opportunities presented by article 32 investigations with minimal danger to the accused. The defense could afford to get to the article 32 stage early and without the extensive preparation demanded by trial. The defense did not need to worry about preparing a basis for objection to admission of government evidence or to the form of the evidence taken, as most of the Military Rules of Evidence are inapplicable at the article 32 investigation.[14] Basically, a defense counsel could use the article 32 proceeding to learn about the case in preparation for trial without risk to the client. The result was a tremendous saving of time, energy, and aggravation for all parties.

Because the government could not call a witness and then introduce that witness's article 32 testimony at trial, defense counsel could make full use of the article 32 investigation's discovery potential without fear. The defense could use the pretrial hearing to learn about the case, and could rely on the opportunity to cross-examine government witnesses at trial before the finder of fact, thereby preserving the real cross-examination until the day of trial. The low risk of the article 32 proceeding to the accused's court-martial position, its time-efficient means of providing valuable discovery of evidence, and the relaxed format with respect to the Military Rules of Evidence usually made defense counsel participation in an early article 32 investigation in the client's best interest, and a preferred defense option.

The Court of Military Appeals, however, changed that preferred defense option in recent decisions that radically have altered the basis for the defense bar's traditional approach to the article 32 investigation. In *Arruza*,[15] a brief opinion by Judge Cox, the court affirmed the use at trial, over defense objection, of the article 32 testimony of a six-year old sex abuse victim. The child, although present at trial, refused to testify, allegedly as the result of defense intimidation tactics. The trial judge ruled the child was unavailable for the purposes of Military Rule of Evidence 804(b)(1). At the article 32 hearing, the accused's military defense counsel stated on the record

[12]Mil. R. Evid. 804(b)(1) analysis, app. 22, at 55.

[13]*Id.*

[14]R.C.M. 405(i).

[15]*Arruza*, 26 M.J. at 234.

that the cross-examination of the child was for discovery only. At trial, the accused, then represented by a civilian counsel, objected to admission of the article 32 testimony. The civilian counsel argued that the military defense counsel had conducted the article 32 cross-examination solely for the purpose of discovery and that it therefore lacked the similar motive required by Military Rule of Evidence 804(b)(1).

The Court of Military Appeals flatly rejected this position. Citing the trial judge's special finding that the military defense counsel's cross-examination at the article 32 hearing was both for impeachment and discovery, the court dismissed the accused's argument that his counsel lacked a similar motive at the article 32 investigation.[16] Citing *United States v. Eggers*,[17] the court stated that discovery is not a prime objective of the article 32 proceeding, and held that the following conditions will satisfy the requirements of the sixth amendment and Military Rule of Evidence 804(b)(1):

> 1) The witness is unavailable;
>
> 2) The defense had the opportunity available to cross-examine the witness at the article 32 hearing; and
>
> 3) The investigating officer took the testimony under oath while a reporter made a verbatim record of the testimony.[18]

In *Arruza* the court found that "regardless of the defense counsel's assertions, the opportunity to cross-examine the witness was available to and used by the defense."[19]

Six months later, the court handed down *Conner*. In this far-reaching opinion by Chief Judge Everett, the Court of Military Appeals confirmed and expanded the pro-government pronouncement of *Arruza*. A general court-martial tried and convicted the accused, a seaman aboard the USS *Dahlgren*, for a number of drug offenses, to include conspiracy to possess and distribute marijuana, possession with intent to distribute, and numerous distributions. As commonly occurs in these cases, the conviction resulted from the efforts of a less than pure government source. At the direction of government agents, the source conducted a semicontrolled buy of marijuana from Conner and his two co-accuseds aboard the *Dahlgren*.

The source was present at the joint article 32 investigation. The source testified on direct- and cross-examination. In what now apparently is customary practice at an article 32 hearing, the witness identified and adopted two lengthy question-and-answer sworn statements, which he previously had made to police investigators. For tactical reasons, defense counsel chose not to impeach the witness during cross-examination. The defense opted to reserve impeachment for trial, when it would be most effective. Nowhere in the record did defense counsel state that the cross-examination was for discovery purposes. Nor did the defense object to the witness's adopting his earlier statements to police as part of his article 32 testimony. At the time of the article 32 hearing, however, the defense did not have access to the final investigatory report and other important material helpful for impeachment.

Prior to trial, the witness went absent without authority (AWOL). Consequently, the trial judge ruled that he was unavailable under Military Rule of Evidence 804(b)(1). Accordingly, the trial counsel offered the witness's article 32 testimony, including the two adopted sworn statements. The military judge admitted the former testimony and statements, over strong defense objection.

In concluding that the admission of this evidence was proper, the Court of Military Appeals flatly rejected the position in the drafters' analysis to Military Rule of Evidence 804(b)(1).[20] Despite Congress's intent that the article 32 hearing should afford the accused a useful device for discovery, the court reaffirmed that discovery is not the primary objective of the article 32 investigation.[21] The court stated that the drafters' suggestion to defense counsel that they announce on the record at the article 32 that he or she is limiting the cross-examination to discovery is unworkable in practice.[22] Citing *Arruza*, the court concluded that defense counsel's assertion on the subject is immaterial.[23] That the defense bar has relied on the drafters' interpretation of the rule, since the President enacted Military Rule of Evidence 804(b)(1), apparently made no difference to the court. While recognizing that article 32 grants the accused a broad right of discovery, the court did not believe that this right precludes subsequent reception at trial of article 32 testimony of unavailable witnesses. The court actually believed that this right of discovery, and the unrestricted right it entails to cross-examine witnesses at the article

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[16] *Id.* at 235, 236.

[17] 3 C.M.R. 191 (C.M.A. 1953).

[18] *Arruza*, 26 M.J. at 234 (citing *Eggers*, 3 C.M.R. at 192).

[19] *Id.* at 236.

[20] *Conner*, 27 M.J. at 388.

[21] *Id.*

[22] *Id.*

[23] *Id.*

32 hearing, satisfies the provisions of Military Rule of Evidence 804(b)(1) and the sixth amendment, even if the defense decides not to use that opportunity.[24]

In finding that a defense counsel, at the article 32, has the required "similar motive," the Court of Military Appeals cited to the article 32 investigating officer's duty to make recommendations to the convening authority on disposition of the charges. The court reasoned that this function motivates defense counsel to "... bring out by cross-examination or otherwise any circumstances that might induce the convening authority to dismiss the charges or refer them to a court-martial of limited jurisdiction."[25]

In a sweeping statement, Chief Justice Everett recognized that, for tactical reasons, defense counsel may cross-examine government witnesses only sparingly or even waive the article 32 investigation entirely. Irrespective of this, he concluded that the requirements of the sixth amendment and Military Rule of Evidence 804(b)(1) obtain, simply because defense counsel had the *opportunity* to cross-examine the witness. The former testimony is admissible even though the defense chose not to seize that opportunity by exercising its prerogative to cross-examine a witness.[26] In Chief Justice Everett's view, should the witness become unavailable prior to trial, the defense counsel bears full responsibility for his or her choice not to use the opportunity to cross-examine at the article 32 hearing.

After *Conner* the only prerequisites for article 32 testimony to be admissible at trial are that the witness must be unavailable, the witness must have given the former testimony under oath, and the former testimony must appear in a verbatim record.

The Court of Military Appeals also dismissed Conner's argument that the court-martial did not afford him with a meaningful opportunity to cross-examine the witness because he did not have important impeachment evidence at the article 32 that became available prior to trial. The court found that former testimony is admissible even if, after the article 32 investigation, an accused acquires additional information that the defense might have used in questioning the witness. The court, however, warned that the situation might be different on due process grounds if the accused had requested information from the government prior to the article 32 hearing and the government intentionally withheld it.[27] Absent bad faith on the part of government, the court apparently believes that the opportunity to cross-examine does not mean that the defense must have all materials that it might desire for impeachment. To soften this hard pronouncement, the court granted the trial judge leeway to admit extrinsic evidence of the new impeachment material against the absent witness. The trial judge, however, does not have to admit this evidence.[28]

In ruling that the trial judge properly admitted the entire article 32 testimony, including the two statements to police investigators, the Court of Military Appeals acknowledged that the government was able to introduce prior statements through an absent witness when it would not have been able to do so had the witness testified in person.[29]

Disregarding prevailing practice, the Court of Military Appeals put the onus on defense counsel to object at the article 32 hearing to a witness's adopting his or her prior statements. Absent a defense objection at the article 32 proceeding, the court concluded that these statements are admissible at trial if the witness becomes unavailable. The court, however, indicated that the result might have been different if the defense had objected to the witness adopting the prior statements at the article 32.[30] Accordingly, defense counsel should beware: Object at the article 32 hearing to a witness's adopting his or her prior statements, or live with the consequences.

Reasoning that the defense counsel can make specific *evidentiary* objections at trial, the Court of Military Appeals brushed aside the difficulty presented by the fact that a majority of the Military Rules of Evidence do not apply at the article 32 stage.[31] The court, therefore, relied on the protection afforded to the accused whereby, upon a proper and timely objection, a trial judge may exclude inadmissible portions of the article 32 testimony. Finally, the Court of Military Appeals noted that because former testimony is a well-recognized hearsay exception, no need exists for the trial counsel to establish independently the reliability of the prior testimony. No matter how fantastic the article 32 testimony may be, all the trial counsel has to do is satisfy the requirements of *Conner* and the former testimony comes in.[32]

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[24] *Id.* at 389.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 390.

[28] *Id.* at 391.

[29] *See* Mil. R. Evid. 613(b), 803(5), 810(d)(1).

[30] *Conner*, 27 M.J. at 389, 390.

[31] R.C.M. 405(i).

[32] *Conner*, 27 M.J. at 391.

Less than a month later, the Court of Military Appeals decided the companion cases of *Hubbard* and *Spindle*, who were co-accuseds in a forcible sodomy-murder. In these trials the government introduced, over defense objection, the article 32 testimony of an accomplice who was the only eyewitness to the crimes. The accomplice became unavailable when he went AWOL prior to trial. In *Hubbard* Chief Justice Everett cited *Conner* to dispose of summarily the defense's sixth amendment and Military Rule of Evidence 804(b)(1) objections based on a lack of opportunity and similar motive to cross-examine.[33] The court further held that the trial judge properly admitted the prior testimony even though defense counsel had made specific requests for information from the government, and even though the government had not made that information available to the defense prior to the article 32 proceeding. This information, including the pathologist's final opinion as to cause of death, would have been useful in cross-examining the witness. Ruling that the government did not withhold the evidence intentionally, the court found that, absent bad faith, the fact that the government discloses new evidence helpful to the defense subsequent to the witness's testifying does not affect admissibility under the sixth amendment or Military Rule of Evidence 804(b)(1). The court concluded that it would not preclude the trial judge from admitting former testimony merely because, after testifying, the defense obtained material information on which the defense had no opportunity to cross-examine the witness.[34]

The *Hubbard* court underscored the court's pronouncement in *Conner* that no need exists to establish independently the reliability of the absent witness's former testimony. In *Hubbard* even though the absent witness had given at least five conflicting sworn versions of the events, was a habitual drug user, was a barracks thief, and went AWOL to avoid testifying, the Court of Military Appeals held that admission of his former testimony was proper without further establishing its reliability. Apparently, in the Court of Military Appeals's view, even in the face of significant evidence that questioned the absent witness's version of the facts, his history of unreliability, and his criminal acts, the government need not establish independently the statement's reliability. Instead, the government may rely merely on the fact that former testimony is a well-recognized hearsay exception.[35]

Finally, in *Spindle*, the Court of Military Appeals once again ruled that the admission of accomplices' testimony is proper.[36] The court also upheld the military judge's refusal to allow the defense to impeach the absent witness by introducing extrinsic evidence of the larcenies he committed upon members of his unit at the time he went AWOL. The court noted that even though the witness, if present, might face cross-examination about this information under Military Rule of Evidence 608(b)(1),[37] the military judge had the discretion to preclude defense counsel from raising it against the absent witness. The court left the trial judge with the discretion to allow or to exclude impeachment of the absent witness by extrinsic evidence of inconsistent statements or bad acts. After *Spindle*, clearly a trial judge does not have to allow this type of impeachment by the defense to admit the former testimony of a "dirty" absent witness.[38]

Because of the *Arruza*, *Conner*, *Hubbard*, and *Spindle* decisions, defense counsel must rethink the role of the article 32 investigation. The Court of Military Appeals clearly has held that it will consider the defense to have had the opportunity to confront all witnesses who testify at the article 32 hearing who subsequently become unavailable prior to trial. As long as the opportunity for unrestricted cross-examination was available to the defense, the witness gave the testimony under oath, and a reporter preserved the testimony on a verbatim record, the article 32 testimony will have met the requirements of Military Rule of Evidence 804(b)(1) and the sixth amendment. This is true regardless of whether or not defense counsel made use of the opportunity to cross-examine, and regardless of whether or not defense counsel stated on the record an intent to use the article 32 proceeding solely for discovery. In addition, absent a showing that the government purposely withheld material evidence requested by the defense, later discovery of useful information, upon which the defense counsel was not able to cross-examine a witness, clearly will not necessarily require the trial judge to exclude that witness's prior testimony. Defense counsel aware of the potential for the use of article 32 testimony at trial must be prepared to object at the pretrial investigation to witnesses adopting prior statements as well as incorporating other objectionable evidence into their testimony. The final result is that, although the opportunity for discovery still exists at the article 32 investigation, the potential price to the accused is staggering.

Unquestionably, the beneficiary of these changes is the government. Each opinion goes contrary to prevailing practice at the expense of the accused. In each decision, the government obtained a significant benefit from the

[33] *Hubbard*, 28 M.J. at 32.

[34] *Id.* at 32, 33.

[35] *Id.* at 33.

[36] *Spindle*, 28 M.J. at 36.

[37] Mil. R. Evid. 608.

[38] *Spindle*, 28 M.J. at 37.

witness's absence. First, the finder of fact did not have the opportunity to see the witness tested under cross-examination by the defense. Additionally, the government was able to introduce evidence favorable to its case that would have been inadmissible if the witness had testified in person. Likewise, in other cases, the government was able to exclude prior inconsistent statements and bad acts about which the defense might have impeached the absent witness if present in court. In every case, the government reaped maximum advantage from the institutionalized knowledge gap that exists between the trial counsel and defense counsel before the article 32 proceeding.

Another result of these decisions is that the golden rule of a trial attorney—that is, never ask a question to which you do not know the answer—must now by necessity apply to article 32 investigations. This strips the article 32 hearing of its usefulness to the defense as a discovery tool.

Of course, defense counsel are not clairvoyant. No one can predict with absolute certainty which witnesses will become unavailable prior to trial. Accordingly, the use of article 32 testimony at trial is always a possibility. To adapt to these changes, the defense bar may pursue strategies altering established practice. A few possibilities are:

1) Interview all witnesses before the article 32 hearing. Prepare to cross-examine all witnesses present as counsel would at trial. Counsel never should ask questions to which they do not know the answers.

2) Demand sufficient time to prepare and use all alternate discovery techniques available. Request the appointment of a defense investigator, if necessary.

3) Get a discovery request to the government early. Ask for anything within the government's control that would be useful in impeaching witnesses on the government's list. Do not go to the article 32 proceeding until the government has provided it.

4) Consider waiving the article 32 in appropriate cases. Do not let the government get a witness who may disappear. If no former testimony exists, Military Rule of Evidence 804(b)(1) cannot hurt you.

5) Be prepared to object at the article 32 hearing to evidence that would be inadmissible at trial. This includes witnesses adopting prior statements or incorporating other objectionable evidence into their testimony.

6) Try to get the government to agree on the record that the parties will not use article 32 testimony at trial. This could save time and energy for all parties.

7) For some important government witnesses, defense counsel should consider pursuing hard cross-examination tactics designed to get a protective investigating officer to restrict or limit the cross-examination.

8) Make greater use of the investigating officer's offer to call additional witnesses or recall prior witnesses.

9) Request to reopen an article 32 investigation as soon as the government discloses new impeachment evidence.

Times have changed and defense counsel must change with them. The article 32 waiver may become more prevalent; however, the defense must be wary, because once counsel waives, he or she cannot revoke the waiver without a showing of good cause. Not only is a showing of good cause difficult to make,[39] but a waiver never is sure protection. Well-established law holds that although the article 32 generally is an acclaimed right of the accused, the government has the power to hold an article 32 hearing in the face of the accused's waiver.[40]

Until recently, the article 32 investigation was a real benefit to the accused. It facilitated timely and cost-effective discovery of evidence and disposition of charges. The recent decisions of the Court of Military Appeals in *Arruza*, *Conner*, *Hubbard*, and *Spindle*, however, effectively make the article 32 proceeding just another pro-government burden for defense counsel to survive. After these decisions, defense counsel must approach the article 32 stage with extreme caution. The danger of saving unfavorable testimony "locked in stone," with no opportunity to impeach through cross-examination before the finder of fact, offsets the potential for gaining useful discovery. Unfortunately, that danger may prove to be too perilous to the accused's case for the article 32 investigation to retain much usefulness to the defense.

[39]United States v. Nickerson, 27 M.J. 330 (C.M.A. 1988).

[40]R.C.M. 405(a) discussion.

The Army Court of Military Review in Fiscal Year 1990

In fiscal year (FY) 1990, the Army Court of Military Review received 1815 cases at issue, an increase of 1.2% over the previous year. The number of decisions issued—1902—also was an increase over FY 1989.

The Court of Military Appeals wrote opinions in 531 cases—an increase of twenty-four percent—and published 159 of those—fifty more than it published in FY 1989. The court issued a total of 1371 short-form affirmances, which occurred in ninety-three percent of the cases in which appellate defense counsel assigned no errors, and in thirty-eight percent of the cases in which appellate counsel had raised issues.

In FY 1990 getting a case through the court, from the Clerk's receipt of the record to the date of decision, took 173 days—three weeks longer than the 152-day average of FY 1989. Although the FY 1990 overall average of 173 days remains less than six months, the average conceals the fact that many cases take much longer. For example, a typical contested trial producing appellate issues may take more than ten months to wind its way through the intermediate appellate level.

The average period for briefing on behalf of the appellant rose from an average of seventy-nine days to about 100 days. This increase apparently was due to the fact that, although the Defense Appellate Division is filing more briefs per attorney (6.7 per month) than at any time since the 1970's, the understrength division has been receiving more cases per attorney (6.8 in FY 1989 and 6.7 in FY 1990) than at any time since 1982.

Briefing time for the government increased only slightly, but the Court of Military Review's average decision time increased twenty-eight percent—from eighteen days to twenty-three days in cases decided with the short-form opinion, and from seventy-three days to ninety-four days in cases decided with memoranda or full opinions. This increase may be due in part to the increased number of opinions issued, which suggests an increased complexity in cases being presented to the court. In this connection, the Court of Military Appeals specified additional issues for briefing in forty-four cases—double the FY 1989 figure. Another factor may be the personnel turbulence caused by bringing several new judges to the court. Although four of the current eleven judges are serving a second tour of duty with the court, from Spring 1989 to Fall 1990 some fourteen losses and fourteen gains occurred.

As the fiscal year ended, the Court of Military Appeals had 171 submitted cases on hand. The appellate divisions were briefing another 555 cases, and the Clerk was awaiting some 235 additional trial records for submission to the court. Accordingly, as of 1 October 1990, the Army Court of Military Review had six months' work on hand or en route.

What to Do When the Accused Waives Appellate Review

Perhaps because accuseds waive appellate review so infrequently, many staff judge advocate offices seem confused about what to do when this happens. Suppose that a general court-martial convicts an accused and sentences him or her to a dishonorable discharge and that the convening authority, in his initial action on the record, suspends the discharge. Thereafter, the accused executes a timely waiver of appellate review on DD Form 2330 pursuant to Rules for Courts-Martial (R.C.M.) 1110(a) and (d).

Every judge advocate facing this scenario should read and understand R.C.M. 1110 and R.C.M. 1112 because, in the wake of an accused's waiver of appellate rights, the processing of the record of trial is different from the usual case.

Instead of dispatching the record of trial to the Clerk of Court for review by the Army Court of Military Review, the responsible staff judge advocate will refer the record of trial to a judge advocate on his or her staff for review as required by R.C.M. 1110(g)(2) and R.C.M. 1112(a)(1), being sure the judge advocate is not disqualified by R.C.M. 1112(c).

The judge advocate will review the record, being careful to comply with the form and content requirements of R.C.M. 1112(d). The judge advocate then will append the original copy of the review to the inside of the front cover of the original record of trial and will make an entry in item 9 of the Chronology Sheet on DD Form 490, "Inside of Front Cover." This is the review "under Article 64(a)" mentioned in item 9 on the inside of the front cover and in item 2 under the heading "Arrangement" on the inside of the back cover.

Next, by virtue of the provisions of R.C.M. 1112(e)(1) or (2), or both, the staff judge advocate will transmit the record to the convening authority for one of the actions required by R.C.M. 1112(f).

The convening authority must promulgate his action. A sample promulgating order appears in Army Regulation 27-10, figure 12-2 (page 80 of the 1989 edition). Because this is a supplementary court-martial order, it will bear the date of publication rather than the date of the convening authority's action. *See* Army Reg. 27-10, Legal Services: Military Justice, para. 12-5*a*(3)(*c*) (22 Dec. 89) [hereinafter AR 27-10]. Paragraph 12-7 of AR 27-10 governs distribution of this supplementary order.

Finally, the staff judge advocate will send the original record to the Clerk of Court, United States Army Judiciary, if one of the following conditions applies:

a) The case was a general court-martial or a special court-martial in which the convening authority approved a bad-conduct discharge. *See* R.C.M. 1112(g)(3); AR 27-10, paras. 5-35*b*, 5-36*b*, 13-5*a*;

b) The case involves an approved dismissal. *See* R.C.M. 1112g(2); AR 27-10, para. 5-35*b*; or

c) The reviewing judge advocate recommended corrective action and the convening authority did not grant that relief or its equivalent. *See* R.C.M. 1112(g)(1); AR 27-10, para. 5-35*b*.

What happens to the record of trial at the Army Judiciary? Cases falling under "c" above—none of which have occurred to date—are referred to the Chief, Examination and New Trials Division, where the Chief processes them for review by The Judge Advocate General in accordance with article 69(b). Cases falling under "b" above are processed through the Criminal Law Division, Office of The Judge Advocate General, for consideration by the Assistant Secretary of the Army (Manpower and Reserve Forces).

The remaining cases are examined solely from an administrative point of view. When, for example, the staff judge advocate failed to facilitate review under R.C.M. 1112, when the convening authority took no supplementary action (including ordering a punitive discharge executed in cases involving an approved unsuspended discharge), or when a copy of the review or copies of the supplementary court-martial order were omitted from the record, the Clerk of Court transmits to the responsible staff judge advocates a form of communication that he or she dislikes to receive. Then the Clerk writes a note for *The Army Lawyer*, such as this one, hoping to forestall similar omissions on the part of others.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

The Meaning of "Concealed" in a Concealed Weapons Charge

In *United States v. Taylor*[1] a court-martial convicted the accused of, *inter alia*, carrying a concealed weapon.[2] He contended that his plea of guilty to this offense was improvident, because his weapon, a .380 semi-automatic pistol, was not concealed.[3] In responding to this contention, the Army Court of Military Review addressed the meaning of "concealed" when used in the context of a concealed weapons charge.

The stipulation of fact accompanying the guilty plea provided, in part, that the weapon at issue was "carried in the accused's car between the driver's seat and the front passenger's seat while the accused was driving the car."[4] The weapon apparently was not hidden on the accused's person, nor was it secreted under the car seat or in the glove compartment.

Carrying a concealed weapon first was enumerated as a distinct offense under military law in the 1984 Manual for Courts-Martial (Manual).[5] The Manual provides that the crime has four elements of proof:

(1) That the accused carried a certain weapon concealed on or about his person;

(2) That the carrying was unlawful;

(3) That the weapon was a dangerous weapon;[6] and

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[1] 30 M.J. 1208 (A.C.M.R. 1990).

[2] Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1982) [hereinafter UCMJ].

[3] *Taylor*, 30 M.J. at 1208.

[4] *Id.* The stipulation of fact also contained conclusory language indicating that the accused's conduct constituted carrying a concealed weapon: "On 15 July 1989, the accused wrongfully carried a concealed weapon on or about his person." *Id.*

[5] Manual for Courts-Martial, United States, 1984, Part IV, para. 112 [hereinafter MCM, 1984]; *see id.*, Part IV, para. 112 analysis, at A21-105.

[6] The Manual provides that, for purposes of a concealed weapons offense, a weapon is dangerous "if it was specifically designed for the purpose of doing grievous bodily harm, or it was used or intended to be used by the accused to do grievous bodily harm." *Id.*, Part IV, para. 112c(2). As the Court of Military Appeals explained in United States v. Bluel, 27 C.M.R. 141 (C.M.A. 1958):

> A straight razor is, of course, not designed for use as a weapon. However, it is "naturally considered a dangerous instrument." And it is readily capable of use as a weapon. Its character as a dangerous but innocent instrument, or as a weapon, depends upon the surrounding circumstances. In other words, whether a particular object is a weapon is often a question of fact.

Id. at 142 (citation omitted).

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[7]

Carrying a concealed weapon under military law is a general intent offense;[8] however, accidental concealment may constitute an affirmative defense.[9] Moreover, the accused's guilt does not turn on whether the weapon was concealed physically on his person; it is sufficient if the weapon is "on or about" the accused's person,[10] which the Manual defines as being "carried on the accused's person or ... within the immediate reach of the accused."[11]

Few reported military cases have construed the meaning of term "concealed" when used in connection with the offense of carrying a concealed weapon. Indeed, only three reported cases provide sufficient factual detail to reflect the manner in which the weapon allegedly was concealed and carried by the accused. In *United States v. Tobin*[12] the accused's conviction for carrying a concealed weapon was affirmed when the accused hid a pistol under his shirt and waistband.[13] The accused's conviction for carrying a concealed weapon likewise was affirmed in *United States v. Thompson*,[14] in which the accused was found to be carrying a revolver under his civilian coat.[15] Finally, in *United States v. Bishop*,[16] the accused's conviction for carrying a concealed weapon was affirmed when the accused carried a loaded pistol under the driver's seat of the car he was driving.[17]

Thus, no military case prior to *Taylor* had addressed the situation in which the weapon allegedly concealed by the accused was neither hidden beneath his clothing nor kept under a car seat within his easy reach. The Court of Military Appeals favorably has quoted the following instruction by a law officer in a concealed weapon case: "A weapon is concealed when it is carried by a person and intentionally covered or kept from sight."[18] The 1984 Manual has adopted this same language in explaining the term "concealed weapon."[19]

Civilian courts have not interpreted "concealed" narrowly to require the accused to have carried the weapon in a manner, or to have held it in a location, that gave absolutely no notice of its presence under any kind of observation.[20] Rather, the courts have held that a weapon is concealed if it is hidden from "ordinary observation."[21] Put another way, the test is whether the weapon is hidden from the ordinary observation of persons who are in full view of the defendant or near enough to him to see the weapon if it were not concealed.[22] One court has defined "ordinary observation" as meaning "the weapon must be open to ordinary observation to those who may come in contact in the usual and ordinary associations" with the person carrying the weapon.[23] As the courts consistently have recognized, whether a particular

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[7]MCM, 1984, Part IV, para. 112b.

[8]United States v. Bishop, 2 M.J. 741, 744 (A.F.C.M.R.), *pet. denied*, 3 M.J. 184 (C.M.A. 1977); *see* United States v. Thompson, 14 C.M.R. 38, 42 (C.M.A. 1954). *See generally* United States v. Tobin, 38 C.M.R. 423, 427-28 (C.M.A. 1968).

[9]*Tobin*, 38 C.M.R. at 428 (citing United States v. Flippen, 37 C.M.R. 242 (C.M.A. 1967), and United States v. Redding, 34 C.M.R. 22 (C.M.A. 1963)). For a discussion of the accident defense generally, see TJAGSA Practice Note, *The Defense of Accident: More Limited Than You Might Think*, The Army Lawyer, Jan. 1989, at 45.

[10]*Bishop*, 2 M.J. at 744.

[11]MCM, 1984, Part IV, para. 112a(3). Military appellate courts have, on several earlier occasions, refused to apply language in the Manual addressing substantive criminal law. *E.g.*, United States v. Harris, 29 M.J. 169 (C.M.A. 1989) (resisting apprehension does not include fleeing apprehension, despite language in the Manual to the contrary); Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988) (President could not change substantive military law by language in the Manual designed to eliminate the defense of partial mental responsibility); United States v. Jackson, 26 M.J. 377 (C.M.A. 1988) (scope of false official statement offenses under military law expanded to include false or misleading responses given during official questioning of the accused, even when the accused did not have an official duty to account, despite language in the Manual requiring such a duty); United States v. Byrd, 24 M.J. 286 (C.M.A. 1987) (Everett, C.J.) (military law must recognize a defense of voluntary abandonment as to criminal attempts, even though the Manual's failure to recognize the defense could indicate an intent by the President to reject it); United States v. Omick, 30 M.J. 1122 (N.M.C.M.R. 1989) (drug distribution can occur without physical transfer of the drug, despite language in the Manual that suggests otherwise). *See generally* UCMJ arts. 36, 56; United States v. Johnson, 17 M.J. 252 (C.M.A. 1984); United States v. Margelony, 33 C.M.R. 267 (C.M.A. 1963).

[12]38 C.M.R. 423 (C.M.A. 1968).

[13]*Id.* at 425.

[14]14 C.M.R. 38 (C.M.A. 1954).

[15]*Id.* at 40.

[16]2 M.J. 741 (A.F.C.M.R.), *pet. denied*, 3 M.J. 184 (C.M.A. 1977).

[17]*Id.* at 743.

[18]*Tobin*, 38 C.M.R. at 428.

[19]MCM, 1984, Part IV, para. 112c(1). *But see supra* note 11.

[20]*See generally* 94 C.J.S. § 8 (1976 Supp.).

[21]*See* Prince v. Commonwealth, 277 S.W.2d 470 (1955); State v. Williamson, 238 N.C. 652, 78 S.E.2d 763, 765 (1953); Harms v. Commonwealth, 309 Ky. 772, 219 S.W.2d 8 (1949); Hall v. Commonwealth, 309 Ky. 74, 215 S.W.2d 804 (1949); People v. Euctice, 371 Ill. 159, 20 N.E.2d 83 (1939).

[22]*Williamson*, 78 S.E.2d at 765.

[23]*Prince*, 277 S.W.2d at 470.

weapon is concealed within the meaning of this test is a factual question.

The court in *Taylor*, however, did not expressly apply this accepted test of "ordinary observation." The court instead quoted from *United States v. Thompson*,[24] wherein the Court of Military Appeals observed that the "vice of carrying the weapon is that the intent to use it unlawfully may be formed at any time. When the urge to kill, rob, or steal is found, the weapon is handy. Making the concealed possession a crime is for preventative purposes."[25] The court in *Taylor* apparently found that the accused's pistol was concealed because he used it to beat innocent passersby who objected to how close the accused drove to them.[26] The court wrote that the "weapon was not apparent to them and would not be until avenues of escape from the deadly menace could be fatally foreclosed."[27]

The quoted language from *Thompson*, however, is not pertinent to the issue of whether a particular weapon is concealed. The court in *Thompson*, in the passage quoted above, sought to explain why carrying a concealed weapon is a general intent crime that does not require proof of an evil intent on the part of the accused; the court did not, in the quoted passage, attempt to construe the meaning of the term "concealed." Indeed, the quoted language is irrelevant to the question of whether a weapon is concealed, because a weapon carried in a manner open to public view likewise can be used for malevolent purposes.

The court in *Taylor* instead should have exercised its independent fact-finding powers[28] to determine expressly whether the weapon in the accused's car was concealed. This determination would have depended upon whether the weapon was open to ordinary observation to persons who were in full view of the accused or near enough to him to see the weapon if it were not concealed.[29] Because the court did not engage in this analysis in *Taylor*, the correctness of its decision remains unclear. Major Milhizer.

Appropriated Funds as Military Property

In the recent case of *United States v. Thomas*[30] the Air Force Court of Military Review addressed whether larceny of certain appropriated funds[31] constituted larceny of military property.[32] In resolving this issue, the court applied its recent *en banc* decision in *United States v. Ford*.[33] Accordingly, a brief review of *Ford* is warranted.[34]

In *Ford* a majority of the Air Force Court, sitting *en banc*, concluded that billeting funds collected from guests staying in billeting facilities were not military property. The majority seemed to apply a bright-line test which held that property is not military property if it does not derive its existence from funds appropriated by Congress and is being held by a nonappropriated fund instrumentality (NAFI) for its exclusive use.[35] Under this test, the majority in *Ford* found that the funds at issue were not military property.

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[24] 14 C.M.R. 38 (C.M.A. 1954).

[25] *Taylor*, 30 M.J. at 1208-09 (quoting *Thompson*, 14 C.M.R. at 42).

[26] *Id.* at 1209.

[27] *Id.* The court in *Taylor* also cited People v. Williams, 39 Ill. App. 3d 129, 350 N.E.2d 81 (1976), wherein the state court held that a weapon which was "visible" inside a car was nonetheless concealed. *Williams*, however, is not dispositive. First, it is a state case, and thus not binding precedent. Second, the question of whether a particular weapon is "concealed" is factual.

[28] *See* UCMJ art. 66(c).

[29] Perhaps the court indirectly applied this standard when it wrote that the "weapon was not apparent to [the victims] and would not be until avenues of escape from the deadly menace could be fatally foreclosed." *Taylor*, 30 M.J. at 1209.

[30] CM 28101 (A.F.C.M.R. 11 Oct. 1990).

[31] The accused in *Thomas* made a permanent change of station move from Illinois to Alaska. *Id.*, slip op. at 2. He was accompanied by his girlfriend only. The accused's claims for temporary lodging, cost of living, and variable housing allowances all indicated that he was accompanied by his wife and son. He also falsely claimed expenses for a "do-it-yourself" move for his wife and son that never was made. In addition, the accused made other false claims involving inflated amounts and a lost identification card for his wife. As a result of this misconduct, the accused received nearly $5700 in excess entitlements. These actions by the accused were charged, *inter alia*, as four specifications of larceny of military property in violation of UCMJ article 21. *Id.*, slip op. at 1.

[32] The distinction has important practical consequences. Larceny of military property of a value of more than $100 is punishable by a dishonorable discharge, total forfeitures, and ten years' confinement, whereas larceny of nonmilitary property of the same value is punishable by a dishonorable discharge, total forfeitures, and five years' confinement. MCM, 1984, Part IV, paras. 46e(1)(c), (d). As the accused in *Thomas* was charged with four larceny specifications, he was exposed to an additional twenty years' confinement based upon the alleged military status of the property.

[33] 30 M.J. 871 (A.F.C.M.R. 1990) (*en banc*).

[34] For an earlier discussion of *Ford*, see TJAGSA Practice Note, *Defining Military Property*, The Army Lawyer, Oct. 1990, at 44.

[35] *Ford*, 30 M.J. at 872-74.

The dissent in *Ford* favored a case-by-case approach.[36] Rather than categorically concluding that all NAFI property is per se "nonmilitary," the *Ford* dissent's approach analyzed the property at issue to see if it was uniquely military in nature or function.[37] The dissent concluded that the billeting funds at issue in *Ford* satisfied this definition of military property, because they were used to maintain and upgrade transient quarters for students and personnel on temporary duty and thus "perform[ed] a *function* directly related to military mission accomplishment."[38]

The concurring opinions in *Ford* specifically addressed the status of money as constituting military property.[39] The concurring judges found that money can never be considered military property, concluding that "while money buys weapons and material which become military property, the money itself does not attain that status."[40]

The court in *Thomas* considered *Ford* and determined that an intermediate, case-by-case test should be applied to determine whether the appropriated funds at issue constituted military property. In this regard, the court noted that:

> The moving and temporary lodging allowances in issue in this case are not unique to the military. Nor are they put to any military function that entitles them to the special protective status (a doubling of the available maximum confinement) accorded "military property" under Article 121, UCMJ. Ordinarily, it is the property it purchases, not the money itself, which has the "uniquely military nature" or will be put to a "function" which merits its inclusion in the specially-protected category of "military property."[41]

Accordingly, the court concluded that the money stolen by the accused was not military property.[42]

By focusing on whether the money at issue has a uniquely military nature or function in determining its property status, the Air Force court has moved more in line with the Army court's approach in *Thompson*[43] and other cases. Until the Court of Military Appeals expressly addresses these issues, however, the viability of *Ford* and *Thomas* remains uncertain. Major Milhizer.

Resisting Apprehension Revisited

Introduction

The recent Army Court of Military Review decision in *United States v. Nocifore*[44] addresses the scope of resisting apprehension[45] in light of the 1989 opinion by the Court of Military Appeals in *United States v. Harris*.[46] *Nocifore* raises several questions about the scope of conduct encompassed by resisting apprehension under the Uniform Code of Military Justice and, concomitantly, the extent to which the court of review correctly has inter-

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[36] *Id.* at 876 (Blommers, J., dissenting).

[37] *Id.* at 877.

[38] *Id.* at 878 (emphasis in original). In United States v. Thompson, 30 M.J. 905 (A.C.M.R. 1990), the Army Court of Military Review used the same case-by-case approach as the dissent in *Ford* used in deciding whether peanuts and coffee, which the accused took from an Army commissary storage facility, were military property. Although the Army court concluded that the particular items at issue in *Thompson* were not uniquely military in nature and function, and thus not military property, the court observed in dicta that it could "envision a situation where property destined for resale by an Army commissary could be considered 'military property'...." *Id.* at 906.

[39] *Ford*, 30 M.J. at 875 (Hodson, C.J., concurring in the result); *id.* at 875-76 (Pratt, J., concurring in the result).

[40] *Id.*

[41] *Thomas*, slip op. at 5. In support of the quoted language, the court in *Thomas* cited to United States v. Schelin, 15 M.J. 218 (C.M.A. 1983), wherein the Court of Military Appeals wrote:

> We agree with the majority of the court below that retail merchandise of the Army and Air Force Exchange Service was not "military property of the United States."... In the absence of any Congressional guidance, it seems most likely to us that "military property" was selected for special protection due to its role in the national defense. In other words, it is either the uniquely military nature of the property itself, or the function to which it is put, that determines whether it is "military property" within the meaning of Article 108. We do not suggest that it is only tanks, cannons, or bombers that merit the protection of Article 108, for many items of ordinary derivation are daily put to military use. However, retail merchandise of the Army and Air Force Exchange Service does not seem to fit into the specially-protected category.

Id. at 220 (footnotes omitted).

[42] The court relied on two other considerations in support of its conclusion. First, the court analogized the accused's misconduct—that is, the larceny of funds in excess of $100—to the "facially similar" offenses of making and presenting false or fraudulent claims of the same amount under UCMJ article 132. In this regard, the court noted that the maximum punishment for these article 132 violations is the same as larceny of "nonmilitary" property. *Compare* MCM, 1984, Part IV, para. 46e(1)(d) (larceny of "nonmilitary" property), *with id.*, Part IV, para. 58e(1) (making or presenting a false claim). Second, the court observed that as the drafter's intent regarding the property status of money under article 121 was uncertain, any ambiguity must be construed in favor of the accused. *Thomas*, slip op. at 5 (citing United States v. Enmons, 410 U.S. 396, 411 (1973) and *Schelin*, 15 M.J. at 220).

[43] 30 M.J. 905 (A.C.M.R. 1990).

[44] ACMR 8903815 (A.C.M.R. 17 Oct. 1990).

[45] UCMJ art. 95.

[46] 29 M.J. 169 (C.M.A. 1989).

preted and applied the *Harris* decision. Before discussing *Nocifore*, a brief review of *Harris* is appropriate.[47]

The Case of United States v. Harris

In *Harris* a military policeman (MP) saw the accused speeding through a red light during the early morning hours at Fort Riley, Kansas.[48] The MP turned on his emergency lights and siren and gave chase, pursuing the accused off post to a trailer park in the civilian community.[49] There the accused abandoned his vehicle and fled into a wooded area despite the MP shouting, "Hold it, Military Police."[50] A short while later the MP apprehended the accused while the latter tried to sneak into his trailer. The accused offered no resistance at that time.[51]

The accused was charged, *inter alia*, with resisting apprehension in violation of article 95.[52] This offense has three elements:

a) That a certain person attempted to apprehend the accused;

b) That said person was authorized to apprehend the accused; and

c) That the accused actively resisted the apprehension.[53]

The Court of Military Appeals in *Harris* observed that, with respect to the first element of proof, the MP testified that his "original intent had been to make an administrative stop, rather than an apprehension";[54] that only after the stop would he "have decided whether to apprehend" the accused; and that "he did not consider the action before arriving at the trailer park to be part of the apprehension."[55] The court noted in this regard "that for the crime of resisting apprehension, there must have been a 'specific intent' on the part of person attempting the apprehension" to effect an apprehension.[56] The court found that the MP's testimony did not establish that he had entertained this requisite intent, and thus the accused's conviction was not supported by the evidence. The court acknowledged that the MP's testimony was

> somewhat implausible for, typically, a military policeman in hot pursuit at high speeds with siren on and lights blazing intends to apprehend the person whom he is pursuing. We must, however, take the record of trial as we find it; and it does not contain the necessary evidence of specific intent on the part of the military policeman.[57]

The court in *Harris* also found a second and "more basic problem"[58] with the government's case—that is, "that no evidence was offered that [the accused] 'resisted' any apprehension which might have been intended by [the MP] during the pursuit."[59] The court thus addressed whether, as a matter of law, fleeing from apprehension can constitute resisting apprehension. The court acknowledged that the Manual provides that the nature of the "resistance must be active, such as assaulting the person attempting to apprehend *or flight*."[60] The court, however, took a contrary position. Relying on the

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[47] For an earlier discussion of *Harris*, see TJAGSA Practice Note, *Fleeing Apprehension is Not Resisting Apprehension*, The Army Lawyer, Dec. 1989, at 35.

[48] *Harris*, 29 M.J. at 170.

[49] *Id.* The chase was conducted at speeds of 75 miles per hour in a 45-mile-per-hour zone. Also, a witness testified that the siren could be heard from as far as a mile away, and the MP stated that at times he closed to within 15 to 20 feet of the accused while in pursuit. *Id.*

[50] *Id.*

[51] *Id.*

[52] UCMJ art. 95: "Any person subject to this chapter who *resists apprehension* or breaks arrest or who escapes from custody or confinement shall be punished as a court-martial may direct" (emphasis added).

[53] MCM, 1984, Part IV, para. 19(b)(1).

[54] UCMJ defines apprehension as "the taking of a person into custody" by a person in authority. UCMJ art. 7; *see also* MCM, 1984, Rule for Courts-Martial 302(a)(1) [hereinafter R.C.M.].

[55] *Harris*, 29 M.J. at 170.

[56] *Id.* at 171 (citing United States v. Baker, 22 B.R. 131, 135 (1943)). Accordingly, a policeman must intend to apprehend the occupant of a vehicle he is stopping to have the requisite intent for this crime. *Id.* (citing Smith v. State, 739 S.W.2d 848, 850 (Tex. Cr. App. 1987)). The court held that the accused's intent is also relevant to the crime of resisting apprehension, in that the accused must be aware that a person was attempting to apprehend him. *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] MCM, 1984, Part IV, para. 19c(1)(c) (emphasis added). The court also observed that preceding Manuals defined "resisting apprehension" in a similar fashion, as did a prominent commentator on the UCMJ. *See Harris*, 29 M.J. at 171-72.

legislative history to the Uniform Code of Military Justice,[61] analogy to state statutes,[62] citation to legal scholars such as Professor Perkins,[63] and the Model Penal Code,[64] the court held that resisting apprehension under article 95 does not occur when an accused merely flees from an attempted apprehension. The court rested its decision on Congress's intent in enacting article 95, writing, "Since Congress gave no indication that it intended for the Article 95 violation to encompass flight from apprehension, we shall not torture the language of the Uniform Code to expand criminal liability in this area."[65]

The Case of United States v. Nocifore

In *Nocifore* civilian police officers, responding to a complaint about drug activity at a laundromat, observed the accused and two other individuals at that location.[66] The accused ran away when the officers approached him. The pursuing officers picked up a clear plastic bag containing suspected cocaine, which they saw the accused throw down as he ran. The officers eventually apprehended the accused. The Army Court of Military Review did not find that the accused used any physical resistance against the police, concluding that he "did nothing more than run from a police officer."[67]

Although the majority of the court in *Nocifore* concluded correctly that the accused's conviction for resisting apprehension should be reversed based upon *Harris*, its application of the *Harris* decision appears too narrow. The court of review wrote in *Nocifore* that the accused's flight from apprehension did not amount to resisting apprehension as proscribed by article 95 because the resulting chase did not endanger law enforcement personnel or others.[68] The court of review explained in *Nocifore* that its restrictive interpretation of *Harris* was based on the Court of Military Appeals' stated intent to conform *Harris* to the rationale expressed by the Army Court of Military Review in *United States v. Kline*.[69]

In *Kline* the Army Court of Military Review concluded that "fleeing or eluding a police officer is not a residuum of elements of Article 95, UCMJ."[70] This is the only portion of the *Kline* opinion expressly quoted by the Court of Military Appeals in *Harris*.[71] The court in *Nocifore* also noted, however, that the *Kline* opinion specifically noted that "Article 95, UCMJ, is designed to protect those persons empowered to apprehend an individual from harm or injury as they seek to restrain an individual who is believed to be or has been engaged in criminal conduct."[72] The *Nocifore* court's restrictive application of *Harris* is based upon this language in *Kline*.

The *Nocifore* court's reliance on the quoted language from *Kline* as the basis for its narrow interpretation of *Harris* is misplaced. In *Harris* the Court of Military Appeals gave no indication that the accused's guilt for an article 95 violation was affected at all by whether anyone was endangered by the MP's high-speed and prolonged chase of the accused. Indeed, the court made no reference to this issue at any point in its four-page opinion.[73] The

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[61] *See Harris*, 29 M.J. at 172 (citing authorities).

[62] *See* Tennessee v. Garner, 471 U.S. 1, 10 n.9 (1985).

[63] R. Perkins, Criminal Law 554 (3d ed. 1982).

[64] *See* Model Penal Code § 242.2 commentary at 214 (1980).

[65] *Harris*, 29 M.J. at 173.

[66] *Nocifore*, slip op. at 1.

[67] *Id.*, slip op. at 3.

[68] *Id.*

[69] 15 M.J. 805 (A.C.M.R. 1983), *aff'd on other grounds*, 21 M.J. 366 (C.M.A. 1986).

[70] *Id.* at 807.

[71] *Harris*, 29 M.J. at 173.

[72] *Kline*, 15 M.J. at 807, *quoted in Nocifore*, slip op. at 3.

[73] Undeniably, some of the authorities cited by the court in *Harris* support the rationale of the *Nocifore* court. For example, Model Penal Code § 242.2 commentary at 214, cited by the court in *Harris*, 29 M.J. at 173, provides in part:

> If the arrestee is innocent of that crime, it may well be thought unfair to punish him for spontaneous flight or some other reflexive act of resistance that *does not risk breach of the peace*. More to the point, authorizing criminal sanctions for any effort to avoid arrest would invite grave abuse. *Minor acts of evasion* and resistance are sufficiently ambiguous to give rise to honest error, sufficiently elusive to encourage false allegations, and sufficiently commonplace to afford general opportunity for discriminatory enforcement.

(emphasis added). The quoted language can be read to advocate that fleeing apprehension will constitute resisting apprehension when a breach of the peace is risked or the evasion is more than a minor act. This is essentially what the court in *Nocifore* concluded. The fact remains, however, that regardless of the wisdom of the *Nocifore* rationale and the authorities which may agree with it, the court in *Harris* unequivocally reached a more sweeping conclusion that fleeing apprehension does not amount to resisting apprehension as proscribed by article 95, without regard to whether others were endangered while authorities chased the accused.

court concluded instead, without qualification, that "the drafters of the Uniform Code never contemplated that 'flight' from attempted apprehension would constitute a violation of Article 95."[74] Had the potential endangerment to others been important to the Court of Military Appeal's decision in *Harris*, that court surely would have either discussed the issue expressly or remanded the case to the court of review for factual findings pertinent to that question.[75]

The *Nocifore* court's interpretation of the above-quoted language from *Kline* does not withstand a close reading of the *Kline* decision. The court in *Kline* wrote that article 95 was "designed to protect those persons empowered to apprehend an individual from harm or injury as they *seek to restrain* an individual;"[76] the court did not write that article 95 extended to protecting persons from indirect harm while chasing a fleeing individual with the intent of catching him so he then could be restrained. In fact, the *Kline* court supported its conclusion that the preemption doctrine[77] did not apply in that case by contrasting the gravamen of article 95 to a state statute that was designed "to protect the general public from the great risk of serious injury or property damage inherent in a high-speed vehicular chase."[78] In other words, had the court in *Kline* interpreted article 95 as being consistent with the court's interpretation of that statute in *Nocifore*, it would have reached the opposite conclusion that preemption applied. Accordingly, it would have reversed the accused's article 134 conviction.[79]

The dissent in *Nocifore* went even further, concluding that *Harris* was not controlling because its discussion pertaining to fleeing apprehension was only dicta.[80] The dissent found that the "essential part in the *Harris* ruling was merely the determination of the intent of the apprehending officer. Once made, it negated the necessity of a decision on what constituted 'resisting' apprehension."[81] As the majority in *Nocifore* correctly noted, however, the *Harris* opinion was decided on two grounds: 1) the subjective intent of the pursuing MP—that is, the absence of an intent by the MP to apprehend the accused; and 2) the objective circumstances surrounding the apprehension—that is, that fleeing apprehension does not constitute resisting apprehension under article 95.[82] Because the court's decision in *Harris* rested "equally"[83] upon two distinct grounds, neither can be relegated to the category of obiter dictum.[84]

Both the majority and the dissent in *Nocifore* also assailed the wisdom of broadly interpreting *Harris* to mean that all incidents involving flight or elusion do not violate article 95. The majority complained that such an interpretation would "almost encourage our military and civilian police to engage in fisticuffs at each apprehension and arrest."[85] This concern, however, seems overstated given the circumstances in *Harris* and *Nocifore*, in which the accused's flight from law enforcement officials was followed by a nonviolent apprehension. To the extent that commanders nonetheless share the court's concern in *Nocifore* that violence may result from a broad interpretation of *Harris*, they are free to promulgate punitive regulations[86] and assimilate appropriate state statutes[87] to proscribe flight from apprehension and thus deter such misconduct.

The dissent in *Nocifore* complained further, however, that such regulations place the government in the "awkward situation"[88] of punishing fleeing apprehension

[74] *Harris*, 29 M.J. at 172.

[75] *See generally* United States v. Mobley, 31 M.J. 273 (C.M.A. 1990)

[76] *Kline*, 15 M.J. at 807, *quoted in Nocifore*, slip op. at 3 (emphasis added).

[77] *See generally* TJAGSA Practice Note, *Mixing Theories Under the General Article*, The Army Lawyer, May 1990, at 66, 68-69.

[78] *Kline*, 15 M.J. at 807.

[79] The accused in *Kline* was convicted, *inter alia*, of eluding a police officer in violation of a Maryland state statute assimilated under clause 3 of UCMJ article 134.

[80] *Nocifore*, slip op. at 4 (Deline, J., dissenting).

[81] *Id.* This author also concluded in an earlier note that this portion of the *Harris* opinion was dicta. TJAGSA Practice Note, *Fleeing Apprehension is Not Resisting Apprehension*, The Army Lawyer, Dec. 1989, at 35, 37. For the reasons discussed herein, the author has re-evaluated his position and concluded that this portion of the *Harris* opinion is not dicta.

[82] *Nocifore*, slip op. at 2. Curiously, the majority in *Nocifore* wrote that the *Harris* court "went further than the facts of the case" in reaching the issue of whether fleeing apprehension constitutes resisting apprehension. *Id.* In this regard, it cannot be gainsaid that any time a court is presented with two independent bases for reversal, reliance upon both is unnecessary to accomplish a proper disposition of the case as either will suffice for that purpose. Nevertheless, the majority's language mischaracterized the holding in *Harris*. This second part of the *Harris* opinion addressed an independent basis for reversal, which was directly and necessarily raised by the circumstances surrounding the accused's apprehension. Thus, neither basis for reversal "went further than the facts of the case" because both were compelled by the facts of the case.

[83] The term "equally," as used in this context, means only that either ground independently would support reversal of the accused's conviction.

[84] *Nocifore*, slip op. at 2 (citing Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949)); *see* Massachusetts v. United States, 333 U.S. 611, 623 (1948); United States v. Title Ins. Co., 265 U.S. 611, 623 (1924); Union Pacific Co. v. Mason City Co., 199 U.S. 160 (1905); Railroad Cos. v. Schutte, 103 U.S. 188, 143 (1880).

[85] *Nocifore*, slip op. at 3.

[86] *See* UCMJ art. 92.

[87] *See* Assimilative Crimes Act, 18 U.S.C. § 13 (1982); *see also Kline*, 15 M.J. at 805.

[88] *Nocifore*, slip op. at 5 (Deline, J., dissenting).

more severely than resisting apprehension.[89] This situation, however, actually is not awkward; nor is it unique or irrational. At first blush, the appropriateness of comparative maximum punishments for related offenses, especially when some are prescribed by article 95, may sometimes seem questionable.[90] In prescribing the maximum punishments for article 95 offenses, the President apparently has decided that all such violations may warrant a particular and relatively severe maximum permissible punishment[91]—not because of the underlying conduct involved, but because the accused has engaged in actions that strike at the commander's ability to ensure compliance with orders having a direct military nexus. In other words, the gravamen of a disobedience offense does not turn on the precise misconduct perpetrated by the accused; instead, it concerns the accused's "failure to obey a lawful order based upon a military purpose [and thus] ... the military as a whole ... is the primary victim of a disobedience offense... ."[92]

Finally, even assuming that the *Harris* decision is unwise and will lead to unfortunate results, the Court of Military Appeals in *Harris* spoke in categorical terms when it concluded that Congress did not intend article 95 to embrace fleeing from apprehension absent physical resistance. To construe *Harris* otherwise pays insufficient deference to an unequivocal holding of the military's highest appellate authority.[93]

Conclusion

Nocifore is only the first published opinion by a court of review that construes and applies *Harris*. The issues raised by *Nocifore* are not unique, and thus practitioners must be prepared to address them as they arise in future cases. Major Milhizer.

Legal Assistance Items

Faculty members of The Judge Advocate General's School have prepared the following notes to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. Attorneys in the field also can adapt them for use as locally-published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; authors should sent submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Tax Notes

Congressional Changes To Tax Laws

One of the 101st Congress's last acts was to pass the Omnibus Budget Reconciliation Act of 1990.[94] This legislation, signed by President Bush on 5 November 1990, makes several significant changes to the tax code. Most of these changes will take effect for tax year 1991.

The new budget reconciliation bill raises the top tax bracket (marginal rate) to thirty-one percent to replace the current thirty-three percent phase-out bracket. The current fifteen percent and twenty-eight percent rates are retained. The thirty-one percent rate begins at $49,200 for single individuals; $82,050 for joint returns; $70,350 for head-of-household filers; and $41,025 for married couples filing separately. The law sets the alternative minimum tax rate at twenty-four percent.

Capital gains will be taxed at a maximum rate of twenty-eight percent after 1990.[95] Thus, for tax year 1991, net capital gain will not be taxed at a rate higher

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[89] The maximum punishment for violating a lawful general order or regulation includes a dishonorable discharge and confinement for two years. MCM, 1984, Part IV, para. 16e(1). The maximum punishment for resisting apprehension includes a bad-conduct discharge and confinement for one year. *Id.*, Part IV, para. 19e(1). Of course, one could argue that based upon the fears expressed by the dissent in *Nocifore*, fleeing apprehension should be punished more severely than resisting apprehension because innocent bystanders as well as the police may be put at risk when the accused flees.

[90] For example, many commands have general orders or regulations that prohibit liquor in the barracks or other designated locations. Violators are exposed to punishment that includes a dishonorable discharge and confinement for two years. *Id.*, Part IV, para. 16e(1). Several other alcohol related offenses, which are arguably more aggravated, provide for a less severe maximum punishment. *E.g.*, *id.*, Part IV, para. 73e (drunk and disorderly conduct—confinement for six months and no discharge); *id.*, Part IV, para. 74e (drinking liquor with a prisoner—confinement for three months and no discharge); *id.*, Part IV, para. 75e (drunk prisoner—confinement for three months and no discharge). *See generally* United States v. Emmons, 31 M.J. 108, 115 (Everett, C.J., concurring in the result).

[91] Of course, court-martial punishment is individualized. *See* United States v. Horner, 22 M.J. 294 (C.M.A. 1986); R.C.M. 1002. Prosecutorial discretion and post-trial action by the convening authority operate to mitigate inappropriately severe sentences. *See generally* TJAGSA Practice Note, *The Military's Anomalous Kidnapping Laws*, The Army Lawyer, Dec. 1988, at 32 (discussing prosecutorial discretion); R.C.M. 1107(d) (convening authority's action on the sentence).

[92] Milhizer, *The Divestiture Defense and* United States v. Collier, The Army Lawyer, Mar. 1990, at 3, 9 (citations omitted).

[93] In a recent unpublished opinion, United States v. Underwood, CM 8902734 (A.C.M.R. 3 Oct. 1990), another panel of the Army Court of Military Review apparently concluded that *Harris* does stand for the proposition that "merely fleeing for an attempted apprehension does not constitute resisting apprehension under Article 95" without regard to whether others were placed in danger. *Id.*, slip op. at 1. The court concluded further that the *Harris* decision should be applied prospectively only. *Id.* slip op. at 1-2 (citing United States v. Carter, 25 M.J. 471 (C.M.A. 1988)). The correctness of the latter holding is beyond the scope of this note.

[94] Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990).

[95] I.R.C. § 1(j) (1982) (amended by Omnibus Budget Reconciliation Act of 1990, § 11101(c), 104 Stat. 1388 (1990) (to be codified as amended at I.R.C. § 1(h))).

than twenty-eight percent, even if the taxpayer's top income dollars are otherwise subject to the new thirty-one percent rate.

Another provision that could affect soldiers with substantial outside income is the phaseout of personal exemptions. The deduction for personal exemptions will be phased out under the new bill when the taxpayer's adjusted gross income exceeds certain threshold amounts. The 1991 amounts have been set at $100,000 for single taxpayers, $150,000 for joint returns, $125,000 for head-of-household filers, and $75,000 for married couples filing separately. These amounts will be indexed for inflation after 1991. The phaseout will be accomplished by reducing the exemption by a percentage that increases as adjusted gross income exceeds the established threshold. For example, for single, joint, and head-of-household filers, the exemption amount will be phased out by two percent for each $2,500 of the taxpayer's income that exceeds the threshold amounts.

The new legislation also includes provisions to reduce the total of itemized deductions, other than those for medical expenses, casualty losses, theft losses, and investment interest for higher income taxpayers.[96] The deduction for itemized deductions will be reduced by an amount equal to three percent of the taxpayer's adjusted gross income in excess of $100,000. The total of allowable deductions may not, however, be reduced by more than eighty percent. The $100,000 threshold also will be indexed for inflation for years after 1991.

A new measure will deny a medical expense deduction for all cosmetic surgery completed after 1990. Cosmetic surgery is defined as any procedure that is directed at improving the patient's appearance but does not meaningfully promote the proper function of the body or prevent illness or disease. Amounts paid for insurance coverage for expenses for cosmetic surgery also will not be deductible after 1990.

In addition, the earned income tax credit (EIC) was modified by the new measure. Under present law, taxpayers who maintain a home for one or more children are allowed an advance refundable credit based on the level of the taxpayer's earned income. The earned income credit in 1990 is equal to fourteen percent of the first $6810 of earned income and is phased out at a rate of ten percent of adjusted gross income that exceeds $10,730.

The new measure will modify the credit percentages and adjust the phaseout range for family size. In 1991, the credit percentage is set at 16.7%, and the phaseout percentage is set at 11.93%, for one qualifying child. For two or more children, the credit percentage will be 17.3% and the phaseout percentage will be 12.36%. These amounts will be adjusted for tax years after 1991.

The eligibility rules for EIC have been modified slightly for tax years after 1990. Under current law, EIC is available to married individuals entitled to claim a dependency exemption for a child, head-of-household filers who reside with a child, or a surviving spouse. To be deemed a qualifying child under the modified rules, an individual must satisfy a relationship test, a residency test, and an age test.

The relationship test will be satisfied if the individual is a son, stepson, daughter, or stepdaughter of the taxpayer or is a descendant of a son or daughter of the taxpayer. A foster or adopted child of the taxpayer also will qualify. Adopted children include children who legally are adopted or who are placed with the taxpayer by an authorized adoption placement agency.

The residency test is satisfied if the qualifying relative has had the same principal residence as the taxpayer for more than half the tax year. Foster children, however, must reside with the taxpayer for the entire year. Certain temporary absences because of education or illness will be disregarded. The residence, as under the current tax law, must be in the United States.

An individual will meet the age test if he or she has not reached age nineteen at the end of the tax year, is a full-time student under age twenty-four at the close of the tax year, or is permanently or totally disabled. The rules to determine full-time student status for the purpose of qualifying for the dependency exemption will apply to EIC eligibility.

If an individual is a qualifying child of more than one taxpayer, only the taxpayer with the highest adjusted gross income may claim the EIC for the child for that year. Married couples only may claim the EIC by filing a joint return.

Taxpayers are required to obtain and supply a taxpayer identification number for each qualifying child who is more than age one at the close of the tax year. A new schedule must be completed and filed to claim the EIC after tax year 1990. The schedule must include the name, age, and identification number of qualifying child or children.

The new measure establishes a supplemental young child credit if any of the taxpayer's children are under age one at the close of the tax year. The maximum supplemental young child credit is projected to be $355 in 1991.

The new legislation also imposes higher excise taxes on gasoline, alcohol, and tobacco. In addition, the amount of income subject to the Medicare hospital insurance payroll tax increases from $51,300 to $125,000 starting in 1991. Major Ingold.

Payments Held Not Deductible As Alimony

The Tax Court in *Webb v. Commissioner*[97] upheld the Internal Revenue Service's (IRS) disallowance of an

[96] Omnibus Budget Reconciliation Act, § 11103(a), 104 Stat. 1388 (1990) (to be codified at I.R.C. § 68).

[97] 60 T.C. Memo (CCH) 1024 (1990).

alimony adjustment. The court determined that a separation agreement requiring alimony payments created a liability on the part of the husband-payor to make the payments, which would have been enforceable by the wife's estate had she died. The separation agreement in *Webb* required the husband to make a lump sum payment of $200,000 under a general paragraph entitled "Property Distribution." Another section of the agreement, entitled "Maintenance," required the husband to pay the wife the sum of $40,000 per year for five years. Pursuant to the terms of the separation agreement, the husband's obligation to pay maintenance terminated upon the death of the wife.

The husband paid $215,000 to the wife when the separation agreement was signed in October 1986. The husband subsequently claimed an alimony deduction for this entire amount on his 1986 Federal income tax return. The wife, however, did not report the payments as income on her 1986 return. The IRS subsequently disallowed the husband's alimony deduction and assessed a deficiency on his 1986 income tax liability.

The revised 1984 definition of alimony required that there be no liability to make payments for any period after the death of the payee spouse and that the divorce decree or separation agreement specifically include this prohibition. The 1986 Tax Reform Act removed the requirement that the divorce or separation instrument state that there is no such obligation after the death of the payee spouse.[98] This change does not, however, affect the general prohibition against continuation of alimony payments after the death of the payee. This contingency may be read into a divorce decree or separation agreement if local or state law provides for termination of alimony on the death of the payee.

The court in *Webb* nevertheless considered the language of the agreement itself to determine whether the payments qualified as alimony under the Internal Revenue Code (Code). The court noted that the agreement specifically provided for termination of the annual maintenance payments on the wife's death, but the provision requiring the lump sum payments did not contain any prohibition. The court relied on this contrast to conclude that the lump sum payment did not meet the Code's definition of alimony. The court rejected as "incongruous and absurd" the husband's position that any payments made simultaneously with the issuance of a decree or execution of an agreement necessarily are to be treated as alimony.[99]

Because the definition of alimony continues to exclude payments required to be made after death of the payee, separation agreement drafters should specify clearly that the obligation to make payments terminates upon death if alimony tax treatment is desired. On the other hand, if payments are not intended to qualify as alimony, the Code permits parties to specify in an agreement that payments are not to be treated as alimony.[100] Major Ingold.

Professional Responsibility Note

Attorney Must Disclose Client's Intent to Abduct Child in Violation Of Court Order

In *In re Decker*,[101] an Illinois Appellate Court recently held that a lawyer must obey a court order that she disclose any information she has about her client's criminal intention to abduct the client's child. The court rejected the attorney's claim that the disclosure of the information would violate the attorney-client privilege and the Code of Professional Responsibility.

The client in the matter absconded with his daughter in violation of a child custody order. The client's attorney was ordered to disclose any information she possessed concerning the client's intention to abduct the child. The attorney refused to obey the trial court order and was held in civil contempt.

The lawyer argued before the appellate court that the information was confidential and therefore protected under the attorney-client privilege. The court noted that the United States Supreme Court consistently has held that the attorney-client privilege does not extend to discussions between an attorney and a client relating to the commission of future crimes.[102] The court also observed that, if the rule were otherwise, a client always could immunize any comment he had made simply by relaying it to an attorney.

The court also rejected the attorney's assertion that rule 4-101(d) of the Illinois Code of Professional Responsibility provided her with the absolute right to refuse disclosure. This rule provides, in part, that an attorney may reveal the intention of a client to commit a crime. The attorney argued that because the code gives her the discretion to reveal a client's intention to commit a crime, she could not be ordered to disclose the information by a court.

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[98] I.R.C. § 71(b)1(D) (West Supp. 1986).

[99] 60 T.C. Memo at 1027.

[100] I.R.C. § 71(b)(1)(B) (1986).

[101] *In re* Decker, 1990 W.L. 145385, No. 4-90-0488 (Ill. App. Ct. 4th Dist. Oct. 4, 1990).

[102] *Id.* (citing United States v. Zolin, 109 S. Ct. 2619 (1989), Nix v. Whiteside, 475 U.S. 157 (1986), and Clark v. United States, 289 U.S. 1 (1933)).

The court conceded that an attorney may not be under an affirmative duty to reveal a client's intention to commit a crime under Illinois ethical standards. It noted, however, that there is a vast difference between ethically declining to volunteer information and refusing to disclose non-privileged communications to comply with a court order. The court found that nothing in the Illinois Code grants an attorney the right to resist a court order compelling the release of non-privileged information. Indeed, a provision of the Code requires compliance with court orders as an exception to the duty of confidentiality. Thus, despite the discretion afforded an attorney in rule 4-101, a court may compel disclosure of a client's intention to commit a crime. The court went on to conclude that an *in camera* examination of the communications was an appropriate way to determine if any communications were entitled to protection under the attorney-client privilege.

The Army ethical rule regarding release of information regarding the intention to commit a crime differs from the Illinois rule. Army rule 1.6(b) mandates the release of otherwise confidential information to prevent clients from committing criminal acts likely to cause imminent death; substantial bodily harm; or significant impairment to national security or the readiness of a military unit, vessel, aircraft, or weapon system.[103] Unlike Illinois rule 4-101, the Army rule does not give an attorney the discretion to reveal information relating to a client's intention to commit less serious future crimes. Thus, an Army attorney may not reveal information regarding a client's intention to abduct a child unless the attorney concludes that the abduction is likely to result in imminent death or substantial bodily harm.

Army rule 1.6 does not clearly delineate an attorney's ethical responsibilities when a court order compels release of information concerning future crimes not falling within the mandatory release provisions of rule 1.6. The Army rules do not contain the provision found in the Model Code and in the Illinois rules that specifically excepts from the duty to maintain confidentiality information, the disclosure of which, is required by law or court order.[104] The drafters of the Model Rules of Professional Conduct, upon which the Army rules are based, proposed to include a similar provision in the Model Rules. The provision was not included, however, because the drafters determined that it would be redundant insofar as a lawyer's ethical duties should not usurp an attorney's legal duties.[105]

The comment to Army rule 1.6 provides some guidance in this circumstance by noting that other ethical rules and provisions of law may supercede an attorney's duty of confidentiality.[106] Additionally, the comment makes clear that a lawyer must comply with orders of a court or tribunal of competent jurisdiction requiring the attorney to provide information concerning the client. Accordingly, the conclusion reached by the court in *Decker*—that attorneys must comply with court orders for release of confidential client information—probably would be followed in similar cases arising under the Army rules. Major Ingold.

Soldiers' and Sailors' Civil Relief Act Note

Guaranteed Student Loans and the Six-Percent Interest Cap

Many reserve component soldiers called to active duty during Operation Desert Shield have student loan debts. While several provisions of the Soldiers' and Sailors' Civil Relief Act (SSCRA) may provide relief from some financial obligations,[107] a recent Department of Education (DOE) memorandum[108] affects the application of section 526, title 50, United States Code.[109] Attorneys should be aware of this memorandum because it restricts the scope of an otherwise highly useful aspect of the SSCRA.

The purpose of section 526 is to limit interest on pre-service financial obligations to six percent when a soldier's military service is materially affecting his or her

[103] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers (31 Dec. 1987) [hereinafter DA Pam. 27-26]. The Navy Rule of Professional Conduct is identical to the Army Rule in this regard. *See* Professional Conduct of Judge Advocates, Judge Advocate General Instruction 5803.1 (1987). The Air Force version of rule 1.6, however, is different. Air Force rule 1.6 affords an attorney the discretion to reveal information necessary to prevent a client from committing a crime likely to cause imminent death, substantial bodily harm, or significant impairment of national defense interests. Like the Army and Navy version of Rule 1.6, Air Force Rule 1.6 does not give attorneys discretion to disclose information relating to any other type of future harm.

[104] Model Code of Professional Responsibility, DR 4-101(C) (1980).

[105] *See* ABA Model Rules of Professional Conduct Rule 1.6(b)(4) (proposed final draft, May 30, 1981); ABA Annotated Model Rules of Professional Conduct, at 71.

[106] *See* DA Pam 27-26, rule 1.6 comment. The comment cites rules 2.2, 2.3, 3.3, and 4.1 as examples of ethical rules that require release of otherwise confidential information.

[107] *See* Note, *Soldiers' and Sailors' Civil Relief Act Protection for Active and Reserve Component Soldiers*, The Army Lawyer, Oct. 1990, at 49; Note, *Soldiers' and Sailors' Civil Relief Act: A Look at the Credit Industry's Approach to the Six Percent Limit on Interest Rates*, The Army Lawyer, Nov. 1990, at 49; Note, *Soldiers' and Sailors' Civil Relief Act: Applicability of SSCRA to Automobile Leases; Protection from Mortgage Foreclosure*, The Army Lawyer, Dec. 1990, at 44.

[108] Memorandum, Department of Education, subject: GSL Borrowers Adversely Affected by the Recent U.S. Military Mobilizations, Aug. 29, 1990; *see also* Memorandum, Office of The Judge Advocate General, U.S. Army, subject: Operation DESERT SHIELD Legal Assistance Issues II, 12 Oct. 1990.

[109] 50 U.S.C. App. § 526 (1982).

ability to pay. The DOE memorandum, however, states that this limitation of interest rates is ineffective with respect to guaranteed student loan (GSL) obligations. According to DOE, section 1078(d), title 20, United States Code, affects the scope of the SSCRA protection. Section 1078(d) states that no provision of any federal or state law that limits the interest rate on a loan will apply to the GSL program. DOE's position is that this renders ineffective the section 526 interest cap if the loan in question is a GSL. All other types of loans and credit arrangements, however, remain unaffected by section 1078(d). Additionally, other provisions of the SSCRA, including those providing for a stay of proceedings[110] and reopening default judgments[111] remain available to GSL debtors.

While the six-percent protection is not available for holders of GSLs, the DOE will permit lenders to forbear or to defer GSL payments. A soldier may apply to a lender for an emergency forbearance.[112] "'Forbearance' means permitting the temporary cessation of payments, allowing an extension of time for making payments, or accepting smaller payments than were previously scheduled."[113] According to the DOE memorandum, a lender may grant an emergency forbearance for up to six months based on a phone call or written request from the borrower or a close family member. The borrower and lender must enter a written agreement for an extension of forbearance beyond six months.

Borrowers serving on active duty, including reserve component personnel on active duty, probably would be served better by applying for a military deferment of their GSLs. Under DOE regulations, borrowers serving for up to three years on active duty in the armed forces or the Commissioned Corps of the Public Health Service may receive a military deferment.[114] In most cases, a deferment means a borrower will have periodic installment payments of principal deferred during active service of up to three years. If a soldier entered a GSL agreement before October 1, 1981, he or she may also apply for a six-month grace period of deferment that begins after the completion of the deferment period for military service. Interest, however, usually will accrue and must be paid by the borrower during the deferment period as well as during any post-deferment grace period.

Soldiers often will be unaware of the availability of military deferments and may not submit requests concurrent with orders to active duty. DOE regulations anticipate late requests and authorize a retroactive application of the deferment period for up to six months before the lender receives the deferment request.[115] The request for deferment should include documentation sufficient to establish eligibility for deferment. In most cases, a copy of orders calling a soldier to active duty should be sufficient.

For loans that do not qualify for the six-percent cap on interest, such as those in which nonmilitary spouses are separately obligated, as well as loans that do not qualify for military deferments, negotiation remains the key. Lenders often will agree to reduced or deferred payments when informed that an individual who has either directly or indirectly been making payments has been ordered to active duty. Negotiation in good faith often will provide the relief necessary during Operation Desert Shield, without resorting to legal proceedings. Major Pottorff.

Hospital Law Note

Removal of Orthodontic Devices (Braces) from Soldiers Deploying on Operation Desert Shield

A recent information paper from the Office of The Surgeon General explains the reason for a dental practice mandating removal of orthodontic devices that has created concern among some reserve component soldiers deploying on Operation Desert Shield.[116] Soldiers being processed for overseas movement have been asking legal assistance attorneys for help in preventing the removal of orthodontic devices by military dental personnel. Alternatively, the clients are interested in funding for replacement devices once they leave active duty, because the devices were installed at personal expense.

The information paper indicates that active duty soldiers receive orthodontic appliances only when they have severe malocclusion or in conjunction with orthodontic surgery. This policy is carried out pursuant to health care regulations, which do not provide for elective cosmetic placement of orthodontic devices. In fact, orthodontic devices may disqualify a person from enlistment, appointment, or induction.[117] Some active and reserve component soldiers have, however, purchased braces pri-

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[110] *Id.* § 521.

[111] *Id.* § 520.

[112] *See* 34 C.F.R. § 682.211 (1990). The Secretary of Education encourages lenders to grant forbearance in order to prevent borrowers from defaulting.

[113] *Id.* § 682.211(a)(1).

[114] *Id.* § 682.210(b)(3).

[115] *Id.* § 682.210(a)(5)(iii).

[116] Information Paper, Office of the Surgeon General, U.S. Army, subject: Orthodontic Appliances and Deployment of Army Personnel to Remote Site Duty, 19 Nov. 1990.

[117] *See* Army Regulation 40-501, Medical Services: Standards of Medical Fitness, paras. 2-5, 5-14 (May 15, 1989) (orthodontic devices are a cause for rejection for enlistment, appointment, or induction; soldiers who have orthodontic devices installed after enlistment, appointment, or induction are qualified for retention).

marily for cosmetic purposes. Health care policy makers have concluded that these braces cannot be maintained in the Desert Shield area. Braces often have rough or sharp edges and are considered by health officials to be a source of constant irritation and infection that may pose a hazard to wearers and other members of their units. Additionally, the information paper notes that the diversity of orthodontic appliances in use precludes military orthodontists from providing proper care in most cases.

Army command policy requires soldiers to submit to medical care necessary to alleviate suffering or to protect or maintain the health of others.[118] Most soldiers affected by the decision to remove orthodontic devices, however, are concerned primarily with the cost of replacing the devices once they return from deployment. To date, monetary relief or military installed replacement braces have uncertain prospects. Health care officials have not yet decided to replace the braces or fund their replacements. The information paper noted that some civilian orthodontists have indicated they will remove and replace appliances at no cost to the soldiers involved. Attorneys should explore this possibility with clients, and if unsuccessful, contact servicing Dental Activities for assistance and guidance. Major Pottorff.

Family Law Note

Congress Amends the Uniformed Services Former Spouses' Protection Act

In 1981, the Supreme Court held in *McCarty v. McCarty*[119] that military retired pay could not be divided as marital property in a divorce proceeding, absent a federal statute allowing such division. Congress responded to *McCarty* in 1983 by enacting the Uniformed Services Former Spouses' Protection Act (USFSPA).[120] The USFSPA permits state courts to divide "disposable military retired pay"[121] as marital property if authorized by state law.

Belatedly, Congress expressed its intent to make the USFSPA have prospective effect only.[122] Some state courts, however, continued to reopen pre-*McCarty* cases to award military retirees' former spouses a share of military retired pay.[123] To prevent this, Congress has amended the USFSPA through section 555 of the National Defense Authorization Act for Fiscal Year 1991 (FY91 Authorization Act).[124] In part, section 555 provides that a final decree of divorce, dissolution, annulment, or legal separation issued prior to the decision in *McCarty* cannot be reopened to order a subsequent division of military retired pay. The amendment further provides that in cases in which a court reopened a pre-*McCarty* decree to divide a military pension, retirees will not have to make further payments pursuant to those orders after November 5, 1992.

The FY 91 Authorization Act also makes several changes to the USFSPA's definition of "disposable retired pay."[125] Amounts withheld for federal, state, and local taxes no longer will be deducted for purposes of calculating the amount of disposable retired pay available for division. Instead, amounts paid directly to a former spouse by a military finance center will not be treated as retired pay earned by the retiree. Presumably,

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[118] Army Regulation 600-20, Personnel-General: Army Command Policy, para. 5-4 (March 30, 1988).

[119] 453 U.S. 210 (1981).

[120] 10 U.S.C. § 1408 (1988).

[121] 10 U.S.C. § 1408(a)(4) (1988).

[122] *See* H.R. Rep. No. 563, 100th Cong., 2d Sess. 256 (1988) ("Although the Congress can not preclude state courts from re-opening the pre-McCarty cases, Congress did not intend this to happen").

[123] *See* H.R. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. 609 (1990).

[124] National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 555, __ Stat. __ (1990) (amending 10 U.S.C. § 1408 (1988)).

[125] As amended, 10 U.S.C. § 1408(a)(4) will read as follows:

> "Disposable retired pay" means the total monthly retired pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which—
>
> (A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
>
> (B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
>
> (C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed under the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or
>
> (D) are deducted because of an election under chapter 73 of this title [10 U.S.C.S. § 1431 et seq.] to provide an annuity to a spouse of former spouse to whom a payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

this change means that former spouses will now be responsible for paying any income taxes owed on the portion of retired pay they receive.

Finally, the type of withholdings that can be deducted from disposable retired pay in satisfaction of debts owed to the United States has been limited in scope. In the future, such withholdings will be deducted only when the withholding was prompted by a prior overpayment of retired pay or was required to be recouped by law resulting from the entitlement to retired pay. This amendment effectively will prevent a retiree from using retired pay to satisfy other debts owed the government at the expense of a former spouses.[126] Captain Connor.

Contract Law Note

General Accounting Office Modifies Significant Issue Exception

The General Accounting Office (GAO), in *Dyncorp*,[127] revised the significant issue exception to its timeliness rules. Generally, the GAO requires that a protester file a bid protest prior to the bid opening date or date for receipt of initial proposals if the alleged error is apparent from the face of the solicitation.[128] The protester must file all other protests within ten days of actual or constructive knowledge of the basis of protest.[129] The GAO may consider an untimely protest when good cause for late filing or a significant issue is shown.[130]

A significant issue traditionally has been one that meets two tests: 1) the issue has not been previously considered by GAO; and 2) the issue is of widespread interest to the procurement community.[131] These two tests have been very difficult to meet. A separate line of cases, however, has found significant issues when the record established a clear violation of a procurement statute or regulation.[132] These cases abandon the requirements that the issue be one of first impression and of widespread interest. In cases such as *Reliable Trash Service Company of Maryland*,[133] the General Accounting Office concluded that correcting a clear error in the procurement was more important than enforcing its timeliness rules.

Dyncorp asserted that the rationale in *Reliable Trash* excused its late protest. It alleged, correctly, that the Army's evaluation scheme was irrational. The evaluation scheme provided that price would be evaluated by adding all line items together. However, two of the transportation line items, for which Dyncorp was significantly more expensive than others, were exclusive alternatives. Therefore, summing both line items doubled the impact of Dyncorp's higher transportation price and resulted in a higher total evaluated price.

The GAO refused to find the Army's clear error a significant issue. It reasoned that the perception that its timeliness rules might be applied inequitably outweighed the harm to the procurement system resulting from errors such as the one alleged. Further, because it notified the agency that the evaluation scheme was materially defective, the agency was free to correct the error, if appropriate. Thus, Dyncorp's protest was dismissed as untimely.

This decision is favorable to the procurement system because it returns a measure of certainty to the GAO protest system that cases such as *Reliable Trash* had threatened. Accordingly, it should contribute to the overall efficiency of the procurement system. Major Jones.

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[126] The government routinely withholds money from retirement checks to satisfy debts owed the United States. Some retirees have used this withholding of retired pay to satisfy federal taxes owed on other income.

[127] Comp. Gen. Dec. B-240980.2 (17 Oct. 1990), 90-2 CPD ¶ 310.

[128] 4 C.F.R. § 21.2(a)(1) (1990).

[129] *Id.* § 21.2(a)(2).

[130] *Id.* § 21.2(b).

[131] *Hunter Envtl. Servs., Inc.*, Comp. Gen. Dec. B-232359 (15 Sept. 1988), 88-2 CPD ¶ 251.

[132] *Reliable Trash Serv. Co. of Md.*, 68 Comp. Gen. 473 (1989); *Adrian Supply Co.*, 66 Comp. Gen. 367 (1987).

[133] 68 Comp. Gen. 473 (1989).

Claims Report

United States Army Claims Service

Claims Note

Claims Teleconferencing

Claims teleconferencing is new and full of potential. During the 1980's, major advances were made in satellite communication, computerization, and fiber optic design. The cost of manufacturing a computer chip with a given amount of memory space dropped to a fifth of what it cost even as recently as the 1970's, and it continues to fall. This has led to major changes in long-distance

communications. The Department of Defense spends billions of dollars each year on C^3 (Command, Control, and Communications) systems. One result of this spending is that every major military installation has or soon will have a video teleconference center. The Pentagon already has four or five.

Video telecommunication essentially involves simultaneous television transmission and reception via satellite or fiber-optic connection between two or more locations. For instance, people at a teleconference site in Maryland can see and converse with people at a site in California. Accordingly, physically separated participants typically feel as if they are in the same room. Because human beings often can communicate more meaning with body language than they do with words, telephone communication—even with conference calls—does not have the same impact.

A typical teleconference center, such as the one at Fort Meade, has a table arrangement in front with room for six people, plus two additional rows of seats in back. The teleconference table has built-in microphones on either side; clip-on microphones are provided for the seating in back.

Five cameras capture the action. One camera shows everyone in the teleconference center. Two others focus in to show close-up views of the persons sitting on either side of the teleconference table. A fourth camera mounted in the ceiling can zoom in on documents or other objects on the table well enough for the participants at other locations to read normal text. Using facsimile capability, another location can copy anything shown on the screen, such as objects, documents, people, or even photographs. A fifth camera can rove around the room.

Two large, thirty-six-inch television-style screens in front, and a third smaller one, show the same images to every location participating in the teleconference. One screen shows the host location, a second shows the other location, and a third shows documents. If three or more locations are linked for a teleconference, the host location can shift the image on the second screen from site to site whenever other locations want to participate. A videotape recorder at any location can be used to record sessions. At each location, a professional controls activity by switching images on the screen and muting sound when necessary. Presently, a teleconference location can link with as many as fifteen other locations at once. Eventually, improvements in the system will allow one location to link with as many as a hundred others.

Military lawyers have many of the same needs that lawyers in the private sector have. Because the expenses of military teleconference facilities are a fixed cost to the installation, an installation that does not make full use of its teleconference center is not getting full value from it. In most cases, from the standpoint of a user activity on the installation, teleconferencing is free.

Over the next decade, teleconferencing will become increasingly important to military lawyers for economic reasons. Because of budget constraints, commanders, managers, and judge advocates increasingly will have to scrutinize requests for temporary duty (TDY) travel carefully. Claims personnel can expect TDY budgets for claims training and witness interviews, which never have been plentiful, to become even tighter than they have in the past. Claims teleconferencing, however, provides a less expensive avenue to conduct activities that normally have required expensive TDY travel.

For tort claims purposes, teleconferencing has far-reaching significance. For instance, it can assist claims attorneys in the crucial task of completing an early investigation of a case, while the facts of a case are still fresh in the witnesses' minds. Teleconferencing will be especially beneficial in the military, where witnesses rotate and regularly are reassigned to other installations. When a witness is reassigned, a claims investigator often must interview the witness over the telephone or write a letter to the witness, but these techniques do not afford the investigator an opportunity to gauge the witness's demeanor and credibility, which are obviously important considerations in litigation. Alternatively, the claims attorney could travel to interview the witness, but few if any claims offices can afford to fund TDY travel for a single witness interview. Unfortunately, witness interviews suffer as a result. Teleconferencing, on the other hand, gives the investigator another option. Often an interviewer can see more of a witness's mannerisms on the television screen than in person. Likewise, the interviewer typically loses absolutely nothing by interacting via teleconference with a witness. The advantages of this system mean that both USARCS personnel and field claims investigators will need to use witness interview teleconferencing to a far greater degree in coming years.

The one restriction on *witness interview* teleconferences is that they should not be recorded. Recording makes witnesses less comfortable, and, unlike the written memoranda of record that investigators prepare, recordings are discoverable. The United States Army Claims Service (USARCS) has an agreement with the Department of Justice and Army Litigation Division that interviews will not be recorded except in unusual cases.

In addition to witness interviewing, the Personnel Claims and Recovery Division, USARCS, has used teleconferencing as a means of enhancing the interface opportunities for our field claims office personnel who work daily in a high-volume business. Although USARCS puts on claims training workshops at three different levels each year, only the very smallest offices can send all of their people to formal training. Accordingly, persons at some offices rarely have the opportunity to learn and discuss the latest guidance.

For the Personnel Claims and Recovery Division, teleconferencing supplements conventional claims training

by providing a forum for claims offices to address concerns and to improve their level of understanding. Personnel claims teleconferences focus on this and have involved as many as nine field claims offices at a time so that each office could see and benefit from questions and solutions proposed by other offices.

Through November 1990, the Personnel Claims and Recovery Division held a total of five personnel claims adjudication teleconferences, two carrier recovery teleconferences, and two affirmative claims teleconferences. Each teleconference was scheduled for two hours and involved personnel from between three to nine field claims offices. Representatives from both the Air Force and the Navy claims and tort litigation staffs have attended, and the Navy already is preparing to do its own claims teleconferences.

The format for these forum teleconferences has remained largely unchanged. At the beginning of each teleconference, participants from each office are asked to introduce themselves to get them used to speaking before a camera, after which USARCS personnel briefly explain new guidance and policies. Field claims personnel then have an opportunity to ask questions that they were instructed to prepare beforehand on virtually any issue. In the time remaining, field claims personnel are asked to respond to teaching hypotheticals and questions mailed out prior to the teleconference.

Based on critiques received, the overall response has been highly favorable. Not only were claims personnel almost uniformly enthusiastic about the information being exchanged, but teleconferencing provided an opportunity for every person in the claims office to attend. The majority of the comments received can be summarized by the recurring recommendation that USARCS hold teleconferences in all claims subject areas on a monthly or quarterly basis.

Unfortunately, scheduling teleconferences in three or four claims subject areas on a quarterly basis, even for the seventy-four Army claims offices in the continental United States, would stretch USARCS resources past the breaking point. An additional problem concerns limitations in the teleconference system itself. Currently, each teleconference center is part of a network. Fort Meade, for example, is on the FORSCOM Network and can link only with one location outside the FORSCOM Network at a time. USARCS personnel currently have to use a teleconference facility at the Pentagon to access any significant number of offices in the Training and Doctrine Command (TRADOC) Network. For this reason, most personnel claims teleconferences have been scheduled for FORSCOM offices. The teleconference system is being continually upgraded Armywide, and improvements scheduled for this spring will allow the Fort Meade Teleconference Center to link with all locations without restriction. Eventually, military teleconference centers will be able to link with private centers as well.

Claims teleconferencing does have a future, both for USARCS and for individual claims offices. Personnel claims forum-style teleconferencing never can replace formal claims training, which provides the kind of in-depth and hands-on instruction to which teleconferencing does not lend itself. It can, however, supplement that training and will do so to an increasing degree. Witness interview teleconferencing also will play a greater role as more people become familiar with it, both at USARCS and at the field claims level.

One other interesting use for teleconferencing, which no claims office yet has tried, would be for a claims office in a particular area to schedule itself for individual "tutoring" with USARCS subject-area experts. In months to come, we expect to see a few offices request this.

At present, many military teleconference facilities are underutilized. Many installation activities, including other elements of staff judge advocate offices, have not yet discovered the value of teleconferencing. At the risk of increasing the competition for teleconference time, USARCS suggests that innovative lawyers can apply lessons learned from claims teleconferencing to other military law specialties. Mr. Frezza.

Claims Policy Notes

Asserting Affirmative Claims Against Soldiers, Civilian Employees, Family Members, and Retirees

This is a Claims Policy Note modifying the guidance found in paragraphs 14-8b(2) and 14-13d(2) of Army Regulation 27-20, and paragraphs 9-7, 9-13a, and 9-25 of Department of the Army Pamphlet 27-162. In accordance with paragraph 1-9f of Army Regulation 27-20, this guidance is binding on all Army claims personnel.

The question whether to assert medical care and property damage claims against soldiers, retirees, civilian employees, and their family members has generated significant confusion and controversy. Much of this arises because the rules outlined in Army Regulation 27-20, Legal Services: Claims (28 Feb. 1990) [hereinafter AR 27-20], and Department of the Army Pamphlet 27-162, Legal Services: Claims (15 Dec. 1989) [hereinafter DA Pam 27-162], for medical care assertions against those individuals differ significantly from the rules outlined for property damage assertions, and because paragraph 9-7 of DA Pam 27-162 appears to contradict the language in paragraph 14-13*d*(2) of AR 27-20.

This Service previously has published affirmative claims notes in the August 1989 and February 1990

issues of *The Army Lawyer* in an attempt to illuminate our policies in this area. The following guidance is intended to unify and clarify these policies; to the extent that it conflicts with the provisions of AR 27-20, Chapter 14, this guidance constitutes an exception thereto. *See* AR 27-20, para. 1-9*e*.

Medical Care Assertions Against Soldiers, Civilian Employees, Family Members, and Retirees

The Recovery Judge Advocate (RJA) will not assert a medical care claim against a civilian employee or soldier (including a reserve component soldier) *acting within the scope of employment* who injures someone entitled to medical care, whether or not the soldier or employee has private insurance. This accords with the principles outlined in *United States v. Gilman*, 347 U.S. 507 (1954). For example, if a soldier driving his privately owned vehicle is acting within the scope of employment and causes an accident, injuring other soldiers, the RJA would *not* assert a medical care claim against that soldier or his private insurer, regardless of the degree of fault.

Additionally, the RJA will not assert a medical care claim based on a *tort liability theory* against any person entitled to medical care or his insurer for injuries which that person sustains; conceptually, a person cannot create tort liability by injuring himself. As an example, if a soldier injures himself in a one-car accident, the RJA would not assert a medical care claim against the soldier or his liability insurer for the soldier's own injuries. The RJA may, however, assert a claim on a *third party beneficiary theory* against a person's personal injury protection (PIP) or medical payments coverage for the care provided.

In this context, note that interfamilial tort immunity would *not* necessarily preclude asserting a medical care claim based on a tort liability theory for medical care furnished to a tortfeasor's family members. *See, e.g., United States v. Moore*, 469 F.2d 788 (3d Cir. 1972); *United States v. Haynes*, 445 F.2d 907 (5th Cir. 1971). If, for example, a soldier injures himself and his wife in a car accident, the RJA would not assert a claim for the soldier's medical care, but might (based on the conditions in the next paragraph) assert a claim for the medical care furnished to the wife.

In *other* situations in which the tortfeasor is a soldier, civilian employee, family member, or retiree, the RJA will assert a medical care claim against that person's insurer if he or she is covered by private insurance. If he or she is not covered by insurance, the RJA may only assert the medical care claim with permission from the Affirmative Claims Branch, USARCS. Permission will be granted if there are aggravating circumstances, such as willful misconduct, and the tortfeasor has sufficient assets to satisfy both the injured victim and the government's claim.

Property Damage Assertions Against Soldiers and Civilian Employees

The report of survey system, *see* Army Regulation 735-5, Property Accountability: Policies and Procedures for Property Accountability, chap. 13 (9 Oct. 1989) [hereinafter AR 735-5], is the primary mechanism for collecting from a civilian employee or a soldier (including a reserve component soldier) for damage to government property; report of survey procedures should normally be used whenever applicable. In some instances, collection even can be enforced against a soldier whose family members damage government property, such as assigned quarters. The RJA will not assert a property damage claim against a civilian employee or soldier (including a reserve component soldier) who was *acting within the scope of employment.* Recovery in these cases will be solely under the report of survey system.

If a civilian employee or soldier *not* acting within the scope of employment, a retiree, or a family member has private insurance which would cover damage to government property, the RJA may assert a demand against that insurer. This would be appropriate, for example, when a soldier covered by private insurance travelling on personal business runs into a government sedan, causing damage that far exceeds the amount collectable under chapter 13 of AR 735-5. The claim would be for the difference between the amount of the damage and the amount recovered by means of the report of survey system. In the absence of insurance, no claim will be asserted except that a claim against a retiree may be asserted with USARCS approval.

Further, when no other method of collection exists, such as when a soldier leaves active duty before collection action under the report of survey system can be accomplished, the RJA may assert a claim against the former soldier if he or she has insurance coverage. This applies whether the damage occurred when the soldier was within scope or not.

Collections for "personal clothing and organizational clothing and equipment," *see* Dep't of Army, Unit Supply Update, consolidated glossary (9 Oct. 1989), which reservists, National Guard members, and Reserve Officers Training Corps cadets fail to return should be referred to the United States Army Finance and Accounting Center rather than asserted as property damage claims. A matrix of the above rules is provided below. Mr. Frezza.

ASSERTIONS AGAINST SOLDIERS (S), CIVILIAN EMPLOYEES (CE), FAMILY MEMBERS (FM), AND RETIREES (R)

	Within Scope of Employment (S, CE)	Not in Scope Insured (S, CE, FM, R)	Not in Scope Not Insured (S,CE,FM,R)
MEDICAL CARE (TORT LIABILITY THEORY)	Don't Assert	Assert except for tortfeasor's own injuries	USARCS approval required
MEDICAL CARE (THIRD PARTY BENEFICIARY)	Don't Assert	Assert	N/A
PROPERTY DAMAGE	Don't Assert Use report of survey only	Assert or use report of survey	Don't Assert Use report of survey*

*Exception: In a case involving a retiree, a claim may be asserted *with USARCS approval.*

Litigating Property Damage Cases

This is a Claims Policy Note providing additional guidance to that found in paragraph 14-6 of Army Regulation 27-20, and paragraph 9-10 of Department of the Army Pamphlet 27-162. In accordance with paragraph 1-9f of Army Regulation 27-20, this guidance is binding on all Army claims personnel.

Presently, Army Regulation 27-40, Legal Services: Litigation, para. 5-2 (2 Dec. 1987) [hereinafter AR 27-40], allows the Recovery Judge Advocate (RJA) to refer affirmative claims of $5000 and under directly to the local United States attorney for litigation so long as the case does not involve a question of policy, a collection from the injured party or his attorney, or the setting of a significant precedent. All other cases are forwarded through JACS-PCA and Litigation Division, Office of The Judge Advocate General (OTJAG), to the Department of Justice (DOJ), or a United States attorney.

Effective 1 October 1990, pursuant to new DOJ procedures, cases involving forced collection of certain "debts" under $200,000 will now be sent to the DOJ Central Intake Facility (CIF) in Silver Spring, Maryland, rather than directly to the local United States attorney. This procedure is designed to capture information about ongoing litigation on behalf of the United States. For affirmative claims purposes, this procedure only modifies how *property damage claims under $200,000* are referred to the United States attorneys for litigation. This procedure *does not* apply to medical care recoveries and does not modify the other requirements under paragraph 5-2 of AR 27-40.

Effective immediately, RJAs will refer all property damage claims under $200,000 for litigation through USARCS, ATTN: JACS-PCA. USARCS quickly will review these cases and forward them to the CIF through the Litigation Division, OTJAG, if appropriate.

Prior to forwarding a property damage claim to USARCS for litigation, the RJA will complete a DOJ *agency referral package cover sheet.* The claim packet should include the cover sheet and all the documents normally provided to the United States attorney. For claims over $5000, the RJA also must forward an investigative report prepared in accordance with paragraph 2-4 of AR 27-40.

If statute of limitations problems necessitate quick action on a case, the RJA will contact the Affirmative Claims Branch, USARCS, telephonically (Autovon: 923-7526/7527) to obtain permission to send a case directly to the CIF or a United States attorney. Mr. Frezza and CPT Dillenseger.

Personnel Claims Note

Claims Involving Animals

The Personnel Claims Act, 31 U.S.C. § 3721 (1987), restricts compensation to damage and loss of personal property sustained incident to service. Chapter 11 of AR 27-20 amplifies this provision by noting the distinction between personal and real property and proscribing payment for the latter, including items permanently affixed to the land.

Although they have unique characteristics in that they are living organisms capable of locomotion, domestic animals, such as dogs, traditionally have fit within legal and general definitions of personal property. The original claims statutes, *see* 3 Stat. 261 (1816); 9 Stat. 414 (1849), authorized payment to soldiers for the loss of horses. The military services therefore have agreed that payment for loss or injury to animals, lawfully held for personal use, is allowed. In most cases, these claims will be for household pets and result from theft, intentional wounding, or fire at quarters on an installation. This policy is recognized in the current *Allowance List/Depreciation Guide* (*ALDG*) (1990 Revision), which allows a maximum of $150 per pet and $500 per claim. Payment of claims for pets lost or missing in shipment are specifically prohibited. *See ALDG* at 9, item 104a.

USARCS recently has reviewed several claims involving animals. They provide excellent examples of how these claims should be analyzed and handled.

One claim involved the malicious wounding of a horse owned by a soldier and stabled at an on-post facility. The horse was injured by gunfire from a car passing by the stable on a nearby road. The horse was treated by a veterinarian and fortunately recovered. The soldier submitted a claim for the cost of the treatment, which was over $200. Investigation revealed that the stable was a nonappropriated fund instrumentality (NAFI) that rented stalls

to eligible personnel. USARCS opined that the claim could be considered under Chapter 11 of AR 27-20 because the incident constituted a form of vandalism to property and the veterinary fee could be analogized to a repair cost. The claim, however, was not approved because the owner had executed a waiver agreeing not to hold the United States liable in the event of any injury occurring to the horse while it was located at the stable. This disapproval was in accord with USARCS policy, noted in the February 1990 issue of *The Army Lawyer*, that, ordinarily, losses at facilities such as stables, which exist primarily as a convenience to the user, are not payable if the user has been so informed.

On reconsideration, USARCS received a claim for injuries to an eighteen-month-old "mixed breed" dog. The dog had been purchased for twenty-five dollars from a dog shelter. The dog was injured when an unknown intruder struck it with a blunt instrument. It was treated by a veterinarian and recovered. However, the cost of treatment amounted to nearly $600. The claim was approved in the amount of twenty-five dollars as vandalism to personal property. On reconsideration, the claimant argued that the dog functioned as a "watch dog" and, as such, had increased value. No substantiation was submitted to indicate formal training or any other indication that might have increased the dog's value. The field office determined, with USARCS concurring, that at the time of the injury, the dog was a family pet. Inasmuch as payment was premised on treatment of the dog as personal property, other rules of adjudication must apply. In this case, the "repair cost" (veterinary fees) far exceeded the reasonable replacement cost. Accordingly, the proper payment was the reasonable replacement cost.

Another reconsideration concerned the mysterious death of a Yorkshire terrier in quarters. Early in the day, the dog had been taken for a walk and then fed. The owner left the home and returned later to find the dog dead. The dog was autopsied by a veterinarian who found no signs of illness or injury. The veterinarian, who was not a pathologist, opined that the dog's death possibly resulted from ingesting poison. A military police report stated there was no evidence to indicate that anyone had attempted to injure the dog in any manner. The field office disapproved the claim, noting that the claimant had not substantiated that the dog had died as a result of an unusual occurrence or act of vandalism. USARCS upheld the disapproval and informed the claimant that even if poisoning had been established, this fact alone would not substantiate vandalism because poisoning may result from careless acts, such as misuse of pesticides, as well as intentional ones.

As these cases illustrate, claims involving animals are analyzed and handled similarly to normal property claims. In cases in which horses are stabled on installations, USARCS' risk management policy is to require that owners sign waivers relieving the United States of liability. For cognizable losses of household pets, the amount payable cannot exceed the reasonable market value of the animal, even though veterinary fees may be much higher. Mr. Ganton.

Management Note

Using Reservists in the Claims Office

In these times of shrinking resources, claims office leaders may need outside help to accomplish the claims mission without backlogs. One source of manpower is the JAGC Reserve Component (RC). In every state there are dedicated, talented, and eager RC judge advocates, legal specialists, and noncommissioned officers who can help claims offices. They are in the claims branches of RC staff judge advocate offices, military law centers, international law/claims teams, individual mobilization augumentee spaces, and the individual ready reserve. Working with an active component claims office gives these soldiers practical experience in the Army claims system, which enhances their professional competence.

The most mutually rewarding way to use RC claims personnel is for a branch or team to perform its two-week annual training (AT) working in an installation claims office. To prepare the RC branch or team properly for AT, the chief of claims should attend at least one of the unit's weekend drills. He or she can tell the unit members what the office's needs are, and the unit can develop a plan to accomplish these missions as well as its required training during the AT.

RC judge advocates may be willing to investigate claims that arise near their home of place of work, especially when RC personnel, units, or equipment are involved. Legal specialists or noncommissioned officers may be willing to prepare investigation reports. With the approval of their supervisor, retirement points can be awarded for this work.

RC attorneys also may be willing to prepare tort-law memoranda on local law concerning liability and damages. This can be done in a systematic way so that the active claims office keeps current memoranda as research assets, or only when required to adjudicate a current claim. Again, with supervisory approval, retirement points can be awarded for work performed.

Staff and command judge advocates should contact their CONUSA staff judge advocate office if they want to avail themselves and their claims offices of RC support. As with all activities, the further in advance you plan, the more likely your success.

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office, FORSCOM Staff Judge Advocate's Office, and TJAGSA Administrative and Civil Law Division

Labor Law Notes

Arbitration Award Inconsistent With Agency Regulation

The Federal Labor Relations Authority (FLRA) reviewed exceptions to an arbitration award that had ordered the Army to reimburse a grievant for an amount previously deducted from his pay. The grievant submitted a voucher for expenses on a temporary duty (TDY) trip. Fort Campbell determined that he had submitted fraudulent claims for laundry and tips. Accordingly, it disallowed the entire claim, except for travel costs, and recouped the balance of the travel advance. The resulting grievance required the arbitrator to decide whether the grievant had submitted a false claim. Instead, he determined that the Army had misapplied Joint Federal Travel Regulation (JTR) paragraph C4352, which states that when reasonable cause exists to believe that an employee has falsified a claimed expense on a travel voucher (other than for lodging, meals, or incidentals) the suspect expenses will be disallowed. If reason exists to suspect that the employee has falsified a claim for lodging, meals, or incidentals, the per diem or actual expense allowance for that entire day will be denied. Despite the JTR's defining "incidentals" as including laundry and tips, the arbitrator concluded that those two provisions were contradictory. He resolved the "contradiction" against the Army and ordered the Army to reimburse the grievant. In ruling on the exceptions, the FLRA addressed for the first time whether an arbitration award can be deficient because it is contrary to an agency regulation. It found that 5 U.S.C. chapter 71 had superseded the executive policy that an agency regulation cannot support exceptions to an award. The FLRA will find an arbitration award deficient whenever it conflicts with an agency rule or regulation, so long as the award is not consistent with an applicable provision in the collective bargaining agreement (CBA) that was in effect before the rule or regulation in question. Because the arbitrator had clearly misinterpreted the JTR, and because the award was not enforcing a contrary CBA provision, the award was deficient. The FLRA remanded the award to the parties either to resolve or to resubmit to the arbitrator to decide whether grievant had submitted a false claim. *Fort Campbell Dist., Third Region, Fort Campbell, Ky. and AFGE*, 37 FLRA 186 (1990).

Overtime for Postliminary Activity

Over the dissent of Member Armanderiz, FLRA ruled negotiable a union proposal that employees be paid overtime if, at the end of their shift, they cannot exit the base because of the gate's "mechanical malfunction or any other means of obstruction." The FLRA first concluded that Office of Personnel Management (OPM) regulations implementing overtime entitlements under Title 5 prohibit such payment. Under FLSA, however, as amended by the Portal-to-Portal Act, an employee is entitled to compensation for postliminary activities if expressly provided for by a CBA. OPM regulations implementing FLSA state that preliminary and postliminary activities are not compensable. Nevertheless, the majority interpreted OPM's regulations to be consistent with the statute's CBA exception to the general rule that employers are not liable for payment for preliminary and postliminary activities. *AFGE and Robins AFB, Ga.*, 37 FLRA 197 (1990).

Confidential Employees

The FLRA reviewed a regional director's decision in a clarification of unit petition on two secretarial positions. Management claimed that both employees were excluded from the bargaining unit as confidential employees because they acted in a confidential capacity to their supervisors, who formulated or effected policies in the field of labor-management relations. The regional director found both to be in the bargaining unit. He relied on the fact that one secretary had not yet begun to perform duties involving labor-management relations. He included the other position in the unit, reasoning that it was "clearly of a purely clerical nature." The FLRA stated that, in the future, it will look beyond the actual duties performed by an incumbent, which was the previous standard for determining whether an employee was excluded as confidential. It will consider duties actually to have been assigned when the employee has been informed that he or she will be performing those duties, whether the nature of the job clearly requires those duties, and whether the employee is not yet performing those duties solely because of lack of experience. Applying those criteria, the FLRA found one secretary to be a confidential employee. It also overturned the regional director's decision that the other secretary was in the unit because her position was purely clerical. The FLRA found that the clerical nature of the work had no bearing on a determination of whether an employee acts in a confidential capacity. *Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Ariz.*, 37 FLRA 239 (1990).

Back Pay in Status Quo Ante Order

Continuing the trend of revising its precedent, the FLRA modified an administrative law judge's (ALJ) recommended decision in an unfair labor practice (ULP) complaint alleging violations of 5 U.S.C. sections

7116(a)(1) and (5). The Social Security Administration (SSA) had reassigned an employee without completing I & I bargaining with the union. The ALJ had found the unilateral change to be a violation and ordered a status quo ante (SQA) remedy. He ordered that the reassigned employee be returned to his previous position and that the parties complete bargaining before reassigning him. The FLRA added a back pay order, stating that it no longer will follow *Federal Aviation Administration, Washington, D.C.*, 27 FLRA 230 (1987), to the extent that it requires the amount of back pay to be determined by the outcome of bargaining between the parties when the remedial order includes SQA "and it is clear that an improper personnel action, unlawfully taken without affording the union an opportunity to bargain, resulted in some loss of pay, allowances or differentials." In those cases, the FLRA will consider the violation to satisfy the Back Pay Act's requisite causal nexus and will order payment of backpay. "The question of the amount of backpay owed, as opposed to the issue of whether backpay should be ordered, is a matter for compliance." *Department of HHS, Social Security Admin. (SSA), Baltimore, Md., and Dep't of HHS, SSA, Hartford Dist. Office, Hartford, Conn., and AFGE*, 37 FLRA 278 (1990).

Arbitral Enforcement of Appropriate Arrangements

The FLRA revised its approach to resolving exceptions to an arbitration award that enforces agreement language that could constitute a negotiable appropriate arrangement under 5 U.S.C. section 7106(b)(3). In overturning the suspension of the grievant for refusing to work overtime, the arbitrator had relied on agreement language requiring management to balance operational needs against an employee's personal needs or physical state before assigning overtime to an employee who recently has performed a significant amount of overtime work. Management argued that the award violated its right to assign overtime work. The FLRA reexamined its approach to determining whether an award enforces an appropriate arrangement. As a result, the FLRA no longer will follow *Philadelphia Naval Shipyard*, 35 FLRA 990 (1990), to the extent that it requires a union to raise the applicability of section 7106(b)(3) or present evidence on the question before FLRA will consider whether an award enforces an appropriate arrangement. In addition, the FLRA no longer will follow *Bureau of Engraving and Printing*, 31 FLRA 1250 (1988), for the proposition that an arrangement enforced by an arbitrator is appropriate as long as it does not interfere excessively with a management right. The FLRA no longer will use the analysis applied in negotiability appeals concerning appropriate arrangement language in evaluating these exceptions. Consistent with its policy of narrowly reviewing arbitration awards, the FLRA will determine only whether an arrangement enforced by an arbitrator "abrogates" a management right, rather than whether the arrangement excessively interferes. In this case, the provision enforced by the arbitrator did not totally abrogate management's exercise of its right to assign work. The FLRA therefore denied management's exceptions. *Department of the Treasury, United States Customs Serv. and NTEU*, 37 FLRA 309 (1990).

No Compelling Need for AR 215-3

The FLRA continued its assault on the Army position that pay and benefits are not negotiable. After conducting an evidentiary hearing permitted by a little-used provision in its regulations, the FLRA ruled on a negotiability appeal that consolidated similar proposals presented to the Army, Navy, and Marine Corps in Hawaii. Those proposals concerned inclusion of intermittent nonappropriated fund instrumentality (NAFI) employees in benefit and leave programs. After remand from the United States Court of Appeals for the Ninth Circuit, the FLRA considered the additional arguments of the Army, the Navy, and the Department of Defense (DOD) that their NAFI regulations—including Army Regulation 215-3—are supported by a compelling need and bar negotiation of the proposals in issue. The agencies argued that centralized, uniform rules for NAFI employee fringe benefit programs are indispensable to the efficient and effective accomplishment of the NAFI mission. The FLRA rejected that argument, finding "that the requirement that intermittent employees be excluded from participation in benefit or leave programs is not essential to the accomplishment of the mission of the NAFIs in providing for the MWR [(morale, welfare and recreation)] of active duty military members, their families and retirees." It rejected arguments that increased personnel costs supported a finding of compelling need. The FLRA noted that the criteria for a finding of compelling need do not include increased costs. Nevertheless, the FLRA found that the projected increased costs were not so enormous that the ability of the services to provide MWR programs would be compromised. It also rejected arguments that exclusion of intermittent employees from fringe benefits programs is necessary to ensure a uniform benefit structure for NAFI employees so that the services efficiently and effectively can conduct their MWR programs. The need to establish a uniform personnel policy is also not one of the bases for a finding of compelling need. Furthermore, NAFIs are not uniform in that wages vary between locations because of prevailing wage rate determinations, state minimum wage laws, and voluntary participation in benefits programs. Nor did the agencies establish that Congress's mandate that they create "an all NAF, business-oriented, personnel system with coherent career progression included a specific direction to deny leave or fringe benefits to intermittent employees." Accordingly, the FLRA found that Army Regulation 215-3 and similar Navy and DOD regulations were not supported by a compelling need and did not bar negotiation on the proposals. *Service Employees Int'l Union and Dep't of the Navy, Navy Exch., Pearl Harbor, Haw.*, 37 FLRA 320 (1990).

PT Time as an Appropriate Arrangement

The FLRA reviewed a union proposal that would require the California Air National Guard to grant three hours per week to its dual-status civilian technicians for aerobic fitness training. The FLRA accepted the union's bootstrap argument that the civilian positions had physical fitness requirements because the Air National Guard, to which the employees had to belong, had fitness standards for retention. It agreed that the proposal was an "arrangement" under 5 U.S.C. section 7106(b)(3) because it was reasonably foreseeable that some employees would be adversely affected by the physical fitness requirements. It was not "appropriate," however, because the proposal excessively interfered with management's right to assign work. The benefit to employees of having duty time for fitness activities would be limited in that "the potentially adverse effects may arise only in limited circumstances as to particular employees and are not inevitable." The burden on management would be relatively heavy, because it would require the agency to provide three hours of duty-free time to employees with no provision for exceptions for situations such as instances of staffing shortages. *NAGE and DoD, Nat'l Guard Bureau, The Adjutant Gen., Cal. Nat'l Guard*, 37 FLRA 462 (1990).

Arbitrator Applies Equitable Estoppel

The FLRA set aside an arbitration award that had directed the Army to reimburse a grievant at a higher per diem rate than it originally had paid him. The Army Missile Command had sent the grievant TDY to Saudi Arabia. His original orders had stated that the use of government or contractor eating facilities would be impractical. Management, however, amended the grievant's travel orders while he was in Saudi Arabia, requiring him to eat in government facilities; but he never was notified officially of the amendment. The grievant, therefore, continued to eat in nongovernment facilities. The activity refused to reimburse him at the higher per diem rate based on use of nongovernment eating facilities. The arbitrator ruled that the activity was estopped from denying his request for the higher rate because the grievant had relied on his original travel orders. In its exceptions, the Army argued that the award was contrary to the JTR, which requires the commander at the TDY station to provide a statement of nonavailability of meals to entitle an employee to the higher rate. The FLRA acknowledged that the Supreme Court had ruled in *Office of Personnel Management v. Richmond*, 110 S. Ct. 2456 (1990), that erroneous advice from a government employee cannot estop the government from denying benefits not otherwise permitted by law. It ruled that the JTR precludes the grievant from receiving the higher rate. *Army Missile Command, Redstone Arsenal, Ala., and AFGE*, 37 FLRA 476 (1990).

Home Addresses

FLRA declined to accept the ruling of the District of Columbia Circuit in *FLRA v. Department of the Treasury, Financial Management Service*, 884 F.2d 1446 (D.C. Cir. 1989), that the Privacy Act bars disclosure of employee home addresses to unions requesting them under 5 U.S.C. section 7114(b)(4). The FLRA adhered to its original ruling in *Farmers Home Administration Finance Office, St. Louis, Missouri*, 23 FLRA 788 (1986), as supported by five other courts of appeals, that the union's interest in communicating with bargaining unit members outweighs the employees' limited privacy interest in their home addresses. The FLRA disagreed with the District of Columbia Circuit, reasoning that the Supreme Court opinion in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989), required that the public interest to be balanced against employees' privacy interest is the Freedom of Information Act's purpose of ensuring that government activities are open to the public. The FLRA ruled that the public interest in question is that of the union's duty to represent the interest of all its unit members, arising under section 7101, which states that collective bargaining "contributes to the effective conduct of public business...." It also rejected the District of Columbia Circuit's finding that the routine use exception of the Privacy Act does not permit the disclosure. OPM's published routine use notice for personnel files with employee home addresses permits disclosure to unions "when relevant and necessary to their duties of exclusive representation." The FLRA has interpreted the quoted language as reflecting the same standard as section 7114(b)(4). The court of appeals accepted a subsequent OPM letter that interpreted that routine use as allowing release only if alternative means of communication were not available. For a number of reasons, including its thinking that alternative means of communication are not relevant to the interest balancing here, the FLRA refused to defer to that finding. *Portsmouth Naval Shipyard, Portsmouth, N.H., and Int'l Fed'n of Professional and Technical Eng'rs*, 37 FLRA 515 (1990).

Environmental Law Notes

OTJAG Environmental Law Division and TJAGSA Administrative and Civil Law Division

The following notes advise attorneys in the field of current developments in the areas of environmental law and changes in the Army's environmental policies. OTJAG Environmental Law Division and TJAGSA Administrative and Civil Law Division encourage articles and notes from the field for this portion of *The Army Lawyer*. Authors should submit articles by sending them to The Judge Advocate General's School, ATTN: JAGS-ADA, Charlottesville, VA 22903-1781.

Regulatory Note

Army Asbestos Management Program

Persons exposed to airborne asbestos particles can develop a serious and debilitating lung disease called asbestosis. The Army has an asbestos management program designed to minimize the release of asbestos into the environment and to avoid the unnecessary exposure of individuals to airborne asbestos.[1] Often, accomplishing these objectives requires removing asbestos from various facilities on an installation. Army policy is to contract for asbestos removal unless in-house performance is justified and funded adequately, and personnel are adequately trained.[2] The recent experience of one installation highlights an important issue to be considered when contracting for asbestos removal.

Many states require advance notification of the times and places of asbestos removal.[3] This advance notification allows state regulators to be present at the time of removal. The state regulators can then ensure that the removal is conducted properly and that no health hazards are created. Violating notification requirements can result in an installation's receiving a notice of violation and being assessed a civil penalty.[4]

Recently, an installation that had a contractor remove asbestos from some of its facilities received notices of seven violations for failing to comply with the state's air regulations. Four of those violations were for failing to notify, or for incorrectly notifying, the state of the times and places at which removal would occur. The state also indicated its intent to assess $70,000 in penalties—$10,000 for each violation.

Because asbestos is potentially a "hazardous air pollutant," it is regulated under the Clean Air Act.[5] Section 118 of the Clean Air Act requires federal facilities to comply with "all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity."[6] This broad waiver of sovereign immunity does not explicitly waive immunity for civil penalties. As a result, it is Department of Defense policy not to pay fines assessed for Clean Air Act violations. This policy generally has been supported by the Department of Justice. It has not been well received, however, by many federal district courts that have ruled that federal facilities are subject to state penalties for violations of state air emission laws and regulations.[7] Faced with these numerous adverse precedents, the installation negotiated a settlement with the state. The settlement agreement requires the installation to pay $7000 "in compromise of disputed claims," rather than in payment of "penalties."

While investigating how these violations occurred, the installation discovered that the contract had not included a provision requiring the contractor to notify the state of when and where asbestos removal would take place. The installation's contracting office had elected to assume that responsibility itself but then failed to execute that responsibility properly.

To avoid similar situations from occurring in the future, contracts for removal of asbestos should be reviewed to ensure that all state notification requirements are the responsibility of the contractor. In addition, the contract should require the contractor to indemnify the United States for any fines or penalties assessed against the United States by a state for failure to make required notifications.

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[1] Army Reg. 200-1, Environmental Protection and Enhancement, chap. 10 (23 Apr. 1990).

[2] *Id.* para. 10-2p.

[3] *E.g.*, 40 C.F.R. § 61.146; 401 Ky. Admin. Regs. 57:011; 3?o Del. Regs. Governing Control of Air Pollution No. 21 § 10.1; 26 Md. Regs. Code 26.11.21.03.

[4] *E.g.*, Ky. Rev. Stat. Ann. § 224.994; 7 Del. Code Ann. § 6005; 2 Md. Code Ann. § 2-610.

[5] 42 U.S.C. § 7412 (1988).

[6] *Id.* § 7418.

[7] *E.g.*, United States v. South Coast Air Quality Management Dist., No. CV 89-0548, 1990 WL 156833 (C.D. Cal. Oct. 16, 1990); United States v. Tennessee Air Pollution Control Bd., 31 ERC 1492 (M.D. Tenn. Mar. 2, 1990); Ohio *ex. rel.* Celebreze v. Department of the Air Force, No. C-2-86-0175 (S.D. Ohio Mar. 31, 1987); Alabama *ex. rel.* Graddick v. Veterans Admin., 648 F. Supp. 1208 (M.D. Ala. 1986) (cases holding that the waiver of sovereign immunity in the Clean Air Act was broad enough to permit states to assess fines against federal facilities for air emission program violations).

Personnel, Plans, and Training Office Note

Personnel, Plans, and Training Office, OTJAG

The Army Management Staff College

Two Army civilian attorneys, both assigned outside the continental United States, recently were selected for the Army Management Staff College (AMSC) Class #91-1 (14 January-19 April 1991). The two attorneys who were selected are:

Bruce I. Topletz, NM-13, United States Army South, Fort Clayton, Panama

Herman A. Dyke, Jr., GS-12, OSJA, 3d Armored Division, Hanau, Germany

Currently attending AMSC Class 90-3 is Mr. William E. Kumpe, ARPERCEN, St. Louis, Missouri.

AMSC is a fourteen-week resident course designed to instruct Army leaders in functional relationships, philosophies, and systems relevant to the sustaining base environment. It provides civilian personnel with training analogous to the military intermediate service school level. AMSC has moved to Fort Belvoir, Virginia; however, while it renovates classroom space, AMSC will conduct its instruction at the Radisson Mark Plaza Hotel, Alexandria, Virginia.

The Judge Advocate General encourages civilian attorneys to apply for AMSC as an integral part of their individual development plans. Local Civil Personnel Offices are responsible for providing applications and instructions. Interested personnel also may obtain information contacting Mr. Roger Buckner, Personnel, Plans, and Training Office (AVN: 225-1353). Dates concerning future classes appear below:

CLASS	DATES OF INSTRUCTION	DEADLINE
#91-3	9 SEP — 13 DEC 1991	13 MAY 91

Please note that the listed deadline is the date the application must reach PERSCOM. MACOMS and local Civilian Personnel Offices may establish earlier deadlines for applications that they will process in their commands.

In addition to the normal application process, each attorney should provide one copy of his or her application, with an attached endorsement by the supervising staff judge advocate or command legal counsel, to the following address:

HQDA (DAJA-PT)
ATTN: Mr. Buckner
Pentagon, Room 2E443
Washington, DC 20310-2206

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Using Reservists in the Claims Office

Reserve component claims personnel should read the short item entitled "Using Reservists in the Claims Office" appearing under the Claims Notes section of this issue of *The Army Lawyer*. *See supra* page 60.

1991 Annual Claims Training Workshop

Advanced notice has been provided to continental United States (CONUS) Army staff judge advocates (SJA) and the National Guard Operating Agency, Aberdeen Proving Ground, Maryland, allocating Reserve component quotas for the 1991 Annual Claims Training Workshop.

United States Army Reserve (USAR) officers with a claims mission desiring to attend the workshop must coordinate with CONUS Army SJAs to obtain quotas. National Guard judge advocates with a claims mission should contact Mr. Robert Bailey at the National Guard Operating Agency to obtain a quota.

USAR and National Guard personnel should not assume that they have quotas merely because someone within the Reserve components has cut orders for attendance. The final decision on attendance is made by the Commander, United States Army Claims Service (USARCS), and only Reserve component officers who receive a letter from the Commander, USARCS, advising them that they were accepted, have valid quotas. Contrary to past practice, Reserve component personnel who show up at the workshop without having received USARCS approval will not be permitted to participate in the workshop.

Update to 1991 Academic Year On-Site Schedule

The following information updates the 1991 Academic Year Continuing Legal Education (On-Site) Training Schedule published in the December edition of *The Army Lawyer*:

LTC Robert D. Seaman is replacing COL Richard W. Breithaupt as action officer for the Denver, Colorado, On-Site. LTC Seaman's address is: 2807 S. Ursula Ct., Aurora, CO 80014. He may be reached at: (303) 361-3132. All other information remains the same.

COL Curtis will be the GRA representative at the Columbia, South Carolina, On-Site scheduled for 2-3 March 1991; and CPT Griffin will be at the St. Louis, Missouri, On-Site scheduled for 22-24 February 1991.

The location for the Oklahoma City On-Site, 17-19 May 91, has been selected. It will be held at the Waterford Hotel, 6300 Waterford Blvd., Oklahoma City, OK 73118. All other information remains the same.

CLE News

1. Cancellation of the 4th Program Managers' Attorneys Course.

Last October, the School tentatively rescheduled the 4th Program Managers' Attorneys Course for the week of 11 February 1991. Present budget constraints, however, have continued to limit drastically the number of students who could attend the rescheduled course. Accordingly, the School has cancelled the course *for this academic year.*

2. Resident Course Quotas

The Judge Advocate General's School restricts attendance at resident CLE courses to those who have received allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Personnel may obtain quota allocations from local training offices, which receive them from the MACOMs. Reservists obtain quotas through their unit or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7115, extension 307; commercial phone: (804) 972-6307).

3. TJAGSA CLE Course Schedule

1991

4-8 February: 26th Criminal Trial Advocacy Course (5F-F32).

25 February-8 March: 123d Contract Attorneys Course (5F-F10).

11-15 March: 15th Administrative Law for Military Installations (5F-F24).

18-22 March: 47th Law of War Workshop (5F-F42).

25-29 March: 28th Legal Assistance Course (5F-F23).

1-5 April: 2d Law for Legal NCO's Course (512-71D/E/20/30).

8-12 April: 9th Operational Law Seminar (5F-F47).

8-12 April: 106th Senior Officers Legal Orientation Course (5F-F1).

15-19 April: 9th Federal Litigation Course (5F-F29).

29 April-10 May: 124th Contract Attorneys Course (5F-F10).

8-10 May: 2d Center for Law and Military Operations Symposium (5F-F48).

13-17 May: 39th Federal Labor Relations Course (5F-F22).

20-24 May: 32d Fiscal Law Course (5F-F12).

20 May-7 June: 34th Military Judge Course (5F-F33).

3-7 June: 107th Senior Officers Legal Orientation Course (5F-F1).

10-14 June: 21st Staff Judge Advocate Course (5F-F52).

10-14 June: 7th SJA Spouses' Course. 17-28 June: JATT Team Training.

17-28 June: JAOAC (Phase VI).

8-10 July: 2d Legal Administrators Course (7A-550A1).

11-12 July: 2d Senior/Master CWO Technical Certification Course (7A-550A2).

22 July-2 August: 125th Contract Attorneys Course (5F-F10).

22 July-25 September: 125th Basic Course (5-27-C20).

29 July-15 May 1992: 40th Graduate Course (5-27-C22).

5-9 August: 48th Law of War Workshop (5F-F42).

12-16 August: 15th Criminal Law New Developments Course (5F-F35).

19-23 August: 2d Senior Legal NCO Management Course (512-71D/E/40/50).

26-30 August: Environmental Law Division Workshop.

9-13 September: 13th Legal Aspects of Terrorism Course (5F-F43).

23-27 September: 4th Installation Contracting Course (5F-F18).

4. Civilian Sponsored CLE Courses

April 1991

4: CHBA, Federal Civil Procedure, Chicago, IL.

9: CHBA, Illinois Evidence Update, Chicago, IL.

9: CHBA, Civil Rights, Chicago, IL.

9-12: ESI, Contract Pricing, Los Angeles, CA.

11-13: NCDA, Asset Forfeiture, San Francisco, CA.

14-18: NCDA, Office Administration, Fort Lauderdale, FL.

14-19: NJC, Alcohol and Drugs and the Courts, Reno, NV.

14-May 3: NJC, General Jurisdiction, Reno, NV.

15-19: GWU, Construction Contracting, Washington, D.C.

15-19: ESI, Federal Contracting Basics, Washington, D.C.

16: CHBA, Hospital and Health Care Law, Chicago, IL.

18-19: ESI, Changes, Washington, D.C.

21-26: NJC, Sentencing Misdemeanants, Reno, NV.

21-26: AAJE, Judicial Problem Solving: Creative & Constructive Techniques, New Orleans, LA.

21-26: NJC, Domestic Violence, Reno, NV.

22: CHBA, Environmental Law, Chicago, IL.

22-26: ALIABA, Planning Techniques for Large Estates, New York, NY.

22-26: ESI, Operating Practices in Contract Administration, Washington, D.C.

23: CHBA, Mental Health Law, Chicago, IL.

24-25: ESI, International Offsets, Alexandria, VA.

28-May 3: NJC, Case Management: Reducing Court Delay, Reno, NV.

28-May 3: NJC, Special Problems in Criminal Evidence, Reno, NV.

For further information on civilian courses, please contact the institution offering the course. The addresses appear in the August 1990 issue of *The Army Lawyer*.

5. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Thirty-three states currently have a mandatory continuing legal education (CLE) requirement.

In these MCLE states, all *active* attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, these states require bar members to report periodically either their compliance or their reason for exemption from compliance. Due to the varied MCLE programs, JAGC Personnel Policies, para. 7-11c (Oct. 1988), provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change. Most of these MCLE jurisdictions have approved TJAGSA *resident* CLE courses.

Listed below are the jurisdictions which have adopted some form of mandatory continuing legal education along with a brief description of the requirement, the address of the local official, and the reporting date. The "*" indicates that the state has approved TJAGSA *resident* CLE courses for MCLE credit.

State	Local Official	Program Description
*Alabama	MCLE Commission Alabama State Bar 415 Dexter Ave. P.O. Box 671 Montgomery, AL 36101 (205) 269-1515	-Active attorneys must complete 12 hours of approved continuing legal education per year. -Active duty military attorneys are exempt but must declare exemption annually. -Reporting date: on or before 31 January annually.
*Arkansas	Office of Professional Programs Supreme Court of Arkansas 311 Prospect Building 1501 N. University Little Rock, AR 72207	-MCLE implemented 1 March 1989. -12 hours of CLE each fiscal year. -Reporting period ends 30 June 1990 the first year.
*Colorado	Colorado Supreme Court Board of Continuing Legal Education Dominion Plaza Building 600 17th St. Suite 520-S Denver, CO 80202 (303) 893-8094	-Active attorneys must complete 45 hours of approved continuing legal education, including 2 hours of legal ethics during 3-year period. -Newly admitted attorneys must also complete 15 hours in basic legal and trial skills within 3 years. -Reporting date: 31 January annually.

State	Local Official	Program Description
*Delaware	Commission of Continuing Legal Education 831 Tatnall Street Wilmington, DE 19801 (302) 658-5856	-Active attorneys must complete 30 hours of approved continuing legal education during 2-year period. -Reporting date: on or before 31 July every other year.
*Florida	CLER (Continuing Legal Education Requirement Department) The Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (904) 561-5842, -5600; (800) 342-8060 Toll Free FL; (800) 874-0005 Toll Free US	-Active attorneys must complete 30 hours of approved continuing legal education during 3-year period, including 2 hours of legal ethics. -Active duty military are exempt but must declare exemption during reporting period. -Reporting date: 30 hours every 3 years, on or before last day of a particular reporting month specified for each member.
*Georgia	Executive Director Georgia Commission on Continuing Lawyer Competency 800 The Hurt Building 50 Hurt Plaza Atlanta, GA 30303 (404) 527-8710	-Active attorneys must complete 12 hours of approved continuing legal education per year, including 2 hours of legal ethics. Modification effective 1 January 1990. -Reporting date: 31 January annually.
*Idaho	Idaho State Bar P.O. Box 895 204 W. State Street Boise, ID 83701 (208) 342-8959	-Active attorneys must complete 30 hours of approved continuing legal education during 3-year period. -Reporting date: 1 March every third anniversary following admission to practice.
*Indiana	Indiana Commission for CLE 101 West Ohio Suite 410 Indianapolis, IN 46204 (317) 232-1943	-Attorneys must complete 36 hours of approved continuing legal education within a 3-year period. -At least 6 hours must be completed each year. -Reporting date: 1 October annually.
*Iowa	Executive Secretary Iowa Commission of Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 218-3718	-Active attorneys must complete 15 hours of approved continuing legal education each year, including 2 hours of ethics during 2-year period. -Reporting date: 1 March annually.
*Kansas	Continuing Legal Education Commission Kansas Judicial Center 301 West 10th Street Room 23-S Topeka, KS 66612-1507 (913) 357-6510	-Active attorneys must complete 12 hours of approved continuing legal education each year, and 36 hours during 3-year period. -Reporting date: 1 July annually.
*Kentucky	Continuing Legal Education Commission Kentucky Bar Association W. Main at Kentucky River Frankfort, KY 40601 (502) 564-3793	-Active attorneys must complete 15 hours of approved continuing legal education each year. At least 2 hours must be in legal ethics, professional responsibility, or professionalism. -Reporting date: 30 days following completion of course.
*Louisiana	Louisiana Continuing Legal Education Committee 210 O'Keefe Avenue Suite 600 New Orleans, LA 70112 (504) 566-1600	-Active attorneys must complete 15 hours of approved continuing legal education every year, including 1 hour of legal ethics. -Active duty military are exempt but must declare exemption. -Reporting date: 31 January annually.
*Minnesota	Executive Secretary Minnesota State Board of Continuing Legal Education 200 S. Robert Street Suite 310 St. Paul, MN 55107 (612) 297-1800	-Active attorneys must complete 45 hours of approved continuing legal education during 3-year period. -Reporting date: 30 June every 3d year.

State	Local Official	Program Description
*Mississippi	Commission of CLE Mississippi State Bar P.O. Box 2168 Jackson, MS 39225-2168 (601) 948-4471	-Attorneys must complete 12 hours of approved continuing legal education each calendar year. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 31 December annually.
*Missouri	The Missouri Bar The Missouri Bar Center 326 Monroe Street P.O. Box 119 Jefferson City, MO 65102 (314) 635-4128	-Active attorneys must complete 15 hours of approved continuing legal education per year. Attorneys are also required to have 3 hours professionalism CLE every 3 years. The first compliance period is 1 July 1990 to 30 June 1993. Professionalism credits do not carry-over to the next compliance period if more than 3 hours are earned but do apply to the general 15 hour requirement. -Reporting date: 30 June annually.
*Montana	Director Montana Board of Continuing Legal Education P.O. Box 577 Helena, MT 59624 (406) 442-7660	-Active attorneys must complete 15 hours of approved continuing legal education each year. -Reporting date: 1 April annually.
*Nevada	Executive Director Board of Continuing Legal Education State of Nevada 295 Holcomb Avenue Suite 5-A Reno, NV 89502 (702) 329-4443	-Active attorneys must complete 10 hours of approved continuing legal education each year. -Reporting date: 15 January annually.
*New Mexico	State Bar of New Mexico Continuing Legal Education Commission 1117 Stanford Ave., NE Albuquerque, NM 87125	-Active attorneys must complete 15 hours of approved continuing legal education per year, including 1 hour of legal ethics or code of professional responsibility subjects. -Reporting date: For members admitted prior to 1 January 1990 the initial reporting year shall be the year ending September 30, 1990. Every such member shall receive credit for carryover credit for 1988 and for approved programs attended in the period 1 January 1989 through 30 September 1990. For members admitted on or after 1 January 1990, the initial reporting year shall be the first full reporting year following the date of admission.
*North Carolina	The North Carolina Bar Board of Continuing Legal Education 208 Fayetteville Street Mall P.O. Box 25909 Raleigh, NC 27611 (919) 733-0123	-12 hours per year including 2 hours of legal ethics. -Armed Service members on full-time active duty exempt, but must declare exemption. -Reporting date: 31 January annually.
*North Dakota	Executive Director State Bar of North Dakota P.O. Box 2136 Bismark, ND 58501 (701) 255-1404	-Active attorneys must complete 45 hours of approved continuing legal education during 3-year period. -Reporting date: 1 February submitted in 3-year intervals.
*Ohio	Supreme Court of Ohio Office of Continuing Legal Education 30 East Broad Street Second Floor Columbus, OH 43266-0419 (614) 644-5470	-Active attorneys must complete 24 credit hours in a 2-year period, 2 of which must be in legal ethics. -Active duty military are exempt, but pay a filing fee. -Reporting date: Beginning 31 December 1989 every 2 years.

State	Local Official	Program Description
*Oklahoma	Oklahoma Bar Association Director of Continuing Legal Education 1901 No. Lincoln Blvd. P.O. Box 53036 Oklahoma City, OK 73152 (405) 524-2365	-Active attorneys must complete 12 hours of approved legal education per year, including 1 hour of legal ethics. -Active duty military are exempt, but must declare exemption. -Reporting date: On or before 15 February annually.
*Oregon	Oregon State Bar MCLE Administrator CLE Commission 5200 SW. Meadows Road P.O. Box 1689 Lake Oswego, OR 97034-0889 (503) 620-0222 1-800-452-8260	-Must complete 45 hours during 3-year period, including 6 hours of legal ethics. -Starting 1 January 1988.
*South Carolina	State Bar of South Carolina P.O. Box 2138 Columbia, SC 29202 (803) 799-5578	-Active attorneys must complete 12 hours of approved continuing legal education per year. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 10 January annually.
*Tennessee	Commission on Continuing Legal Education Supreme Court of Tennessee Washington Square Bldg. 214 Second Avenue N. Suite 104 Nashville, TN 37201 (615) 242-6442	-Active attorneys must complete 12 hours of approved continuing legal education per year. -Active duty military attorneys are exempt. -Reporting date: 31 January annually.
*Texas	Texas State Bar Attn: Membership/CLE P.O. Box 12487 Capital Station Austin, TX 78711 (512) 463-1382	-Active attorneys must complete 15 hours of approved continuing legal education per year, including 1 hour of legal ethics. -Reporting date: Birth month annually.
Utah	Utah State Bar Board of CLE 645 S. 200 E. Salt Lake City, UT 84111-3834 (801) 531-9095 800-662-9054	-24 hours during 2-year period,including 3 hours of legal ethics. -Reporting date: 31 December of second year of admission.
*Vermont	Vermont Supreme Court Mandatory Continuing Legal Education Board 111 State Street Montpelier, VT 05602 (802) 828-3281	-Active attorneys must complete 20 hours of approved legal education during 2-year period, including 2 hours of legal ethics. -Reporting date: 30 days following completion of course. -Attorneys must report total hours every 2 years.
*Virginia	Virginia Continuing Legal Education Board Virginia State Bar 801 East Main Street Suite 1000 Richmond, VA 23219 (804) 786-2061	-Active attorneys must complete 8 hours of approved continuing legal education per year. -Reporting date: 30 June annually.
*Washington	Director of Continuing Legal Education Washington State Bar Association 500 Westin Building 2001 Sixth Avenue Seattle, WA 98121-2599 (206) 448-0433	-Active attorneys must complete 15 hours of approved continuing legal education per year. -Reporting date: 31 January annually.

State	Local Official	Program Description
*West Virginia	West Virginia Mandatory Continuing Legal Education Commission E-400 State Capitol Charleston, WV 25305 (304) 346-8414	-Attorneys must complete 24 hours of approved continuing legal education every 2 years, at least 3 hours must be in legal ethics or office management. -Reporting date: 30 June annually.
*Wisconsin	Supreme Court of Wisconsin Board of Attorneys Professional Competence 119 Martin Luther King, Jr. Boulevard Madison, WI 53703-3355 (608) 266-9760	-Active attorneys must complete 30 hours of approved continuing legal education during 2-year period. -Reporting date: 31 December of even or odd years depending on the year of admission. -Nonresident attorneys who do not practice law in Wisconsin are exempt.
*Wyoming	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82003 (307) 632-9061	-Active attorneys must complete 15 hours of approved continuing legal education per year. -Reporting date: 1 March annually.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. However, because outside distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide publications to individual requestors.

To provide another avenue of availability, the Defense Technical Information Center (DTIC) makes some of this material available to government users. An office may obtain this material in two ways. The first way is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. Practitioners may request the necessary information and forms to become registered as a user from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. DTIC will provide information concerning this procedure when a practitioner submits a request for user status.

DTIC provides users biweekly and cumulative indices. DTIC classifies these indices as a single confidential document, and mails them only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and *The Army Lawyer* will publish the relevant ordering information, such as DTIC numbers and titles. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC; users must cite them when ordering publications.

Contract Law

AD B100211	Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).
AD B136337	Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-89-1 (356 pgs).
AD B136338	Contract Law, Government Contract Law Deskbook, Vol 2/JAGS-ADK-89-2 (294 pgs).
AD B144679	Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128	USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
AD B116101	Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
AD B136218	Legal Assistance Office Administration Guide/JAGS-ADA-89-1 (195 pgs).

AD B135453 Legal Assistance Real Property Guide /JAGS-ADA-89-2 (253 pgs).

AD B135492 Legal Assistance Consumer Law Guide /JAGS-ADA-89-3 (609 pgs).

*AD A226160 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-90 (85 pgs).

AD B141421 Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).

*AD B147096 Legal Assistance Guide: Office Directory/JA-267-90 (178 pgs).

*AD A226159 Model Tax Assistance Program/ JA-275-90 (101 pgs).

*AD B147389 Legal Assistance Guide: Notarial/ JA-268-90 (134 pgs).

*AD B147390 Legal Assistance Guide: Real Property/ JA-261-90 (294 pgs).

*AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).

Administrative and Civil Law

AD B139524 Government Information Practices/ JAGS-ADA-89-6 (416 pgs).

AD B139522 Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).

AD B145359 Reports of Survey and Line of Duty Determinations/ACIL-ST-231-90 (79 pgs).

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD B145360 Administrative and Civil Law Handbook/JA-296-90-1 (525 pgs).

AD B145704 AR 15-6 Investigations: Programmed Instruction/JA-281-90 (48 pgs).

Labor Law

AD B145934 The Law of Federal Labor-Management Relations/JA-211-90 (433 pgs).

AD B145705 Law of Federal Employment/ACIL-ST-210-90 (458 pgs).

Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212 Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).

AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).

AD B135459 Senior Officers Legal Orientation/ JAGS-ADC-89-2 (225 pgs).

AD B137070 Criminal Law, Unauthorized Absences/ JAGS-ADC-89-3 (87 pgs).

AD B140529 Criminal Law, Nonjudicial Punishment/ JAGS-ADC-89-4 (43 pgs).

AD B140543 Trial Counsel & Defense Counsel Handbook/JAGS-ADC-90-6 (469 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

REMINDER: Publications are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 40-5	Preventive Medicine	15 Oct 90
AR 725-50	Requisitioning, Receipt, and Issue System	19 Oct 90
CIR 608-90-2	The Army Family Action Plan VII	19 Oct 90
JFTR	Joint Federal Travel Regulations, Vol. 1, Uniformed Services, Change 47	1 Nov 90
JFTR	Joint Federal Travel Regulations, Vol. 1, Uniformed Services, Change 48	1 Dec 90
PAM 210-6	Economic Analysis of Army Alternatives-Concepts, Guidelines, and Formats	8 Oct 90
UPDATE 22	Message Address Directory	30 Sep 90

3. OTJAG Bulletin Board System

Numerous TJAGSA publications are available on the OTJAG Bulletin Board System (OTJAG BBS). Users can sign on the OTJAG BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/ Xoff supported; VT100 terminal emulation. Once logged on, the system will greet the user with an opening menu.

Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and will then instruct them that they can use the OTJAG BBS after they receive membership confirmation, which takes approximately forty-eight hours. A future issue of *The Army Lawyer* will contain information on programming communications software to work with the OTJAG BBS, as well as information on new publications and materials available through the OTJAG BBS.

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) now has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crankc(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via AUTOVON should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

5. Disposition of Army Law Library Materials

The following law library materials will be available from the Office of the Command Judge Advocate, 56th Field Artillery Command, ATTN: AEUAT-CJA (MSG Fox or SSG Raymond), APO New York 09281-6321. Expected date of availability is approximately June of 1991.

LaFave's Search and Seizure	Vol. 1-4 (1990)
Martindale-Hubble Law Directory	1990 Set
Military Justice Citations	Cum. Supp. 1990
U.S. Law Week	1990
U.S.C.A.	1991 Pocket Part, 13 New Vols., and General Index

By Order of the Secretary of the Army:

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